

**THE TEXT IS  
LIGHT IN  
THE BOOK**







THE  
ARTICLES OF WAR  
*ANNOTATED*

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# THE ARTICLES OF WAR *ANNOTATED*

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## CONTENTS

|                                 | Page     |
|---------------------------------|----------|
| ARTICLES OF WAR—ENACTMENT ..... | xxi-xxii |

### CHAPTER I

|  |       |
|--|-------|
| PRELIMINARY PROVISIONS .....                       | 1     |
| ARTICLE 1. DEFINITIONS .....                       | 1     |
| <i>Annotation</i> .....                            | 1     |
| ARTICLE 2. PERSONS SUBJECT TO MILITARY LAW .....   | 1-2   |
| <i>Annotation</i> I. Officers, Soldiers, Etc. .... | 2-7   |
| II. Cadets .....                                   | 7     |
| III. Marine Corps and Naval Personnel .            | 7-8   |
| IV. Civilians .....                                | 8-15  |
| V. Military Prisoners .....                        | 15-16 |
| VI. Members of The Soldiers' Home ..               | 16    |

### CHAPTER II

|  |       |
|--|-------|
| COURTS-MARTIAL—CLASSIFICATION—AND COM-<br>POSITION ..... | 17    |
| ARTICLE 3. COURTS-MARTIAL CLASSIFIED .....               | 17    |
| ARTICLE 4. WHO MAY SERVE ON COURTS-MARTIAL ....          | 17-18 |
| <i>Annotation</i> I. In General .....                    | 18-19 |
| II. Chaplains .....                                      | 19    |
| III. Retired Officers .....                              | 19    |
| IV. Reserve Officers .....                               | 19    |
| V. National Guard Officers .....                         | 19-20 |
| VI. Persons Disqualified .....                           | 20-21 |
| ARTICLE 5. GENERAL COURTS-MARTIAL; COMPOSITION ..        | 21    |
| ARTICLE 6. SPECIAL COURTS-MARTIAL; COMPOSITION ..        | 21    |
| ARTICLE 7. SUMMARY COURTS-MARTIAL; COMPOSITION           | 21    |
| <i>Annotation</i> .....                                  | 21-22 |

## CHAPTER III

|   | Page  |
|---|-------|
| COURTS-MARTIAL—BY WHOM APPOINTED .....                                | 23    |
| ARTICLE 8. GENERAL COURTS-MARTIAL .....                               | 23    |
| <i>Annotation</i> I. In General .....                                 | 24-26 |
| II. By Superior Authority .....                                       | 26    |
| III. By Territorial Commanders .....                                  | 26-27 |
| IV. By Tactical Commanders .....                                      | 27-28 |
| V. By Commanders Empowered by The<br>President .....                  | 28-29 |
| VI. Law member .....  | 29    |
| ARTICLE 9. SPECIAL COURTS-MARTIAL .....                               | 29-30 |
| ARTICLE 10. SUMMARY COURTS-MARTIAL .....                              | 30    |
| <i>Annotation</i> I. In General .....                                 | 30-31 |
| II. Detached Commands .....   | 31-32 |
| III. Retired Officers .....   | 32    |
| ARTICLE 11. APPOINTMENT OF TRIAL JUDGE ADVOCATES<br>AND COUNSEL ..... | 32-33 |
| <i>Annotation</i> I. Trial Judge Advocate .....                       | 33-35 |
| II. Defense Counsel .....   | 35-36 |

## CHAPTER IV

|   |       |
|---|-------|
| COURTS-MARTIAL—JURISDICTION .....                                       | 37    |
| ARTICLE 12. GENERAL COURTS-MARTIAL .....                                | 37    |
| <i>Annotation</i> I. In General .....                                   | 37-39 |
| II. Who Determines Question of Juris-<br>diction .....                  | 39    |
| III. Requirements Necessary to Vest<br>Jurisdiction .....               | 39-40 |
| IV. Court Cannot Strike Out Charges<br>nor Order a Nolle Prosequi ..... | 40    |
| ARTICLE 13. SPECIAL COURTS-MARTIAL .....                                | 40-41 |
| ARTICLE 14. SUMMARY COURTS-MARTIAL .....                                | 41    |
| <i>Annotation</i> I. As to Persons .....                                | 41-42 |
| II. As to Offenses .....  | 42    |
| III. As to Sentences .....  | 43-44 |
| ARTICLE 15. JURISDICTION NOT EXCLUSIVE .....                            | 44    |
| <i>Annotation</i> I. Military Commissions .....                         | 44-47 |
| II. Provost Courts .....  | 47-48 |
| ARTICLE 16. Persons in the Military Service—How Tri-<br>able .....      | 48    |
| <i>Annotation</i> .....   | 48    |

## CHAPTER V

|  | Page  |
|--|-------|
| COURTS-MARTIAL—PROCEDURE .....   | 49    |
| ARTICLE 17. TRIAL JUDGE ADVOCATE TO PROSECUTE;<br>COUNSEL TO DEFEND .....                | 49    |
| Annotation I. Trial Judge Advocate .....   | 49-50 |
| II. Defense Counsel .....  | 50-53 |
| ARTICLE 18. CHALLENGES .....   | 53    |
| Annotation I. In General .....   | 53-54 |
| II. Challenges for Cause .....   | 54-56 |
| III. Peremptory Challenges .....   | 56    |
| ARTICLE 19. OATHS .....  | 56-57 |
| Annotation .....   | 57-59 |
| ARTICLE 20. CONTINUANCES .....   | 59    |
| Annotation .....   | 59-60 |
| ARTICLE 21. REFUSAL OR FAILURE TO PLEAD .....  | 60    |
| Annotation I. Necessity for Arraignment .....  | 60-61 |
| II. Kinds of Pleas .....   | 61    |
| III. General Issue .....   | 61-62 |
| IV. Motions .....  | 62-64 |
| V. Change of Plea .....  | 64-65 |
| VI. Refusal to Plead Does Not Bar De-<br>fense .....                                     | 65    |
| ARTICLE 22. PROCESS TO OBTAIN WITNESSES .....  | 65    |
| Annotation I. In General .....   | 65-66 |
| II. Service of Subpoena .....  | 66    |
| III. Witness Fees .....  | 66-67 |
| IV. Expert Witnesses .....   | 67    |
| V. Witnesses for Defense .....   | 67    |
| ARTICLE 23. REFUSAL TO APPEAR AND TESTIFY .....  | 67-68 |
| Annotation I. In General .....   | 68-69 |
| II. Courts-martial Not Empowered to<br>Punish Witnesses for Refusing to<br>Testify ..... | 69    |
| III. Witnesses Not Exempt from Arrest .  | 69    |
| IV. Competency .....   | 69    |
| ARTICLE 24. COMPULSORY SELF-INCRIMINATION PRO-<br>HIBITED .....                          | 69-70 |
| Annotation I. In General .....   | 70-71 |
| II. Confessions .....  | 71-73 |
| III. Conspirators and Joint Offenders ..   | 73-74 |
| IV. Cross-examination .....  | 74-75 |
| V. Statements of Counsel .....   | 75    |
| ARTICLE 25. DEPOSITIONS; WHEN ADMISSIBLE .....   | 75-76 |



|   | <b>Page</b> |
|---|-------------|
| <i>Annotation</i> I. In General .....   | 76          |
| II. Authentication .....  | 76-77       |
| III. Residence of Deponent .....  | 77          |
| IV. Capital Cases .....   | 77-78       |
| V. Affidavits .....   | 78          |
| ARTICLE 26. DEPOSITIONS; BEFORE WHOM TAKEN ....                                 | 78          |
| <i>Annotation</i> .....   | 78          |
| ARTICLE 27. COURTS OF INQUIRY, RECORDS OF; WHEN<br>ADMISSIBLE .....             | 78          |
| <i>Annotation</i> .....   | 79          |
| ARTICLE 28. CERTAIN ACTS TO CONSTITUTE DESERTION                                | 79          |
| <i>Annotation</i> I. Desertion .....  | 79-80       |
| II. Fraudulent Enlistment .....   | 80          |
| III. Shirking Important Service .....   | 80-82       |
| ARTICLE 29. COURT TO ANNOUNCE ACTION .....                                      | 82          |
| <i>Annotation</i> .....   | 82-83       |
| ARTICLE 30. CLOSED SESSIONS .....   | 83          |
| <i>Annotation</i> .....   | 83          |
| ARTICLE 31. METHOD OF VOTING .....  | 84          |
| <i>Annotation</i> .....   | 84-85       |
| ARTICLE 32. CONTEMPTS .....   | 85          |
| <i>Annotation</i> .....   | 85-86       |
| ARTICLE 33. RECORDS; GENERAL COURTS-MARTIAL ....                                | 86          |
| <i>Annotation</i> I. In General .....   | 87-88       |
| II. Correction .....  | 88          |
| III. Authentication .....   | 88-89       |
| IV. Destruction or Loss .....   | 89-90       |
| V. Revision .....   | 90-91       |
| ARTICLE 34. RECORDS; SPECIAL AND SUMMARY COURTS-<br>MARTIAL .....               | 91          |
| <i>Annotation</i> .....   | 91          |
| ARTICLE 35. DISPOSITION OF RECORDS; GENERAL<br>COURTS-MARTIAL .....             | 92          |
| <i>Annotation</i> .....   | 92          |
| ARTICLE 36. DISPOSITION OF RECORDS; SPECIAL AND<br>SUMMARY COURTS-MARTIAL ..... | 92          |
| ARTICLE 37. IRREGULARITIES; EFFECT OF .....                                     | 92-93       |
| <i>Annotation</i> I. In General .....   | 93-94       |
| II. As to Personnel .....   | 94-99       |
| III. Pleadings .....  | 99-102      |
| IV. Evidence .....  | 102-113     |
| V. Procedure .....  | 113-116     |
| VI. Sentence .....  | 116         |
| VII. The Record .....   | 116-117     |

|   | Page    |
|---|---------|
| ARTICLE 38. PRESIDENT MAY PRESCRIBE RULES ..... | 117     |
| Annotation .....                                | 117-118 |

## CHAPTER VI

|   |         |
|---|---------|
| COURTS-MARTIAL—LIMITATIONS UPON PROSECUTIONS .....  | 119     |
| ARTICLE 39. AS TO TIME .....                        | 119     |
| Annotation I. In General .....                      | 119-120 |
| II. Impediments .....                               | 120-121 |
| III. When Statute Begins to Run .....               | 121     |
| IV. Time of War .....                               | 122     |
| ARTICLE 40. AS TO NUMBER .....                      | 122     |
| Annotation I. In General .....                      | 123     |
| II. Courts of Inquiry, etc. ....                    | 123     |
| III. Disciplinary Action Under A.W. 104 .....       | 124     |
| IV. Jurisdiction of Former Court .....              | 124-125 |
| V. Action of Reviewing Authority ....               | 125     |
| VI. Same Offense .....                              | 125-126 |
| VII. Withdrawal, Discontinuance, or Mistrial .....  | 126     |
| VIII. Trial by Both Military and Civil Courts ..... | 126-127 |
| IX. Reconsideration .....                           | 127-129 |

## CHAPTER VII

|  |         |
|--|---------|
| COURTS-MARTIAL—PUNISHMENTS .....                           | 130     |
| ARTICLE 41. CRUEL AND UNUSUAL PUNISHMENTS PROHIBITED ..... | 130     |
| Annotation I. In General .....                             | 130-131 |
| II. Cumulative Punishments .....                           | 131     |
| ARTICLE 42. PLACES OF CONFINEMENT; WHEN LAWFUL .....       | 131-132 |
| Annotation I. In General .....                             | 132-134 |
| II. Who Designates .....                                   | 134-135 |
| III. Various Offenses .....                                | 135-136 |
| IV. Commitment .....                                       | 136-137 |
| V. Section 289 Federal Penal Code ....                     | 137     |
| ARTICLE 43. DEATH SENTENCE; WHEN LAWFUL .....              | 137     |
| Annotation .....   | 137-138 |
| ARTICLE 44. OFFICERS—REDUCTION TO RANKS .....              | 138     |
| Annotation .....   | 138-139 |

|  | Page    |
|--|---------|
| ARTICLE 45. MAXIMUM LIMITS OF PUNISHMENT ..... | 139     |
| <i>Annotation</i> I. In General .....          | 139-140 |
| II. Form of Punishment .....                   | 140-141 |
| III. Previous Convictions .....                | 141-142 |
| IV. Forfeitures .....                          | 142-144 |
| V. Restriction to Limits .....                 | 144     |
| VI. Plea of Guilty .....                       | 144     |
| VII. Included Offenses .....                   | 145-146 |

## CHAPTER VIII

|   |         |
|---|---------|
| COURTS-MARTIAL—ACTION ON CHARGES .....    | 147     |
| ARTICLE 46. CHARGES—ACTION UPON .....     | 147-148 |
| <i>Annotation</i> I. Who May Prefer ..... | 148     |
| II. Form .....                            | 148-152 |
| III. Oath to .....                        | 152     |
| IV. Investigation .....                   | 152-153 |
| V. Service on Accused .....               | 153-154 |
| VI. Action under Article 104 .....        | 154     |

## CHAPTER IX

|  |         |
|--|---------|
| COURTS-MARTIAL—ACTION ON PROCEEDINGS ....                              | 155     |
| ARTICLE 47. ACTION BY CONVENING AUTHORITY .....                        | 155-156 |
| <i>Annotation</i> I. Assignment of Judge Advocates etc.                | 157     |
| II. Reference for Trial .....  | 157     |
| III. Action on Record of Trial .....                                   | 157-161 |
| IV. Powers Incident to Power to Ap-<br>prove .....                     | 161-165 |
| ARTICLE 48. CONFIRMATION .....   | 165-166 |
| ARTICLE 49. POWERS INCIDENT TO POWER TO CONFIRM                        | 166     |
| <i>Annotation</i> .....  | 166     |
| ARTICLE 50. APPELLATE REVIEW .....                                     | 166-169 |
| ARTICLE 51. MITIGATION, REMISSION AND SUSPENSION OF<br>SENTENCES ..... | 170-171 |
| <i>Annotation</i> I. Mitigation .....                                  | 171-172 |
| II. Remission .....  | 172-174 |
| III. Suspension .....  | 174-175 |
| ARTICLE 52. REHEARINGS .....   | 175-176 |
| <i>Annotation</i> .....  | 176-177 |
| ARTICLE 53. PETITION FOR NEW TRIAL .....                               | 177     |
| <i>Annotation</i> .....  | 177-178 |

## CHAPTER X

|   |         |
|---|---------|
| PUNITIVE ARTICLES—ENLISTMENT; MUSTER; RETURNS .....         | 179     |
| ARTICLE 54. FRAUDULENT ENLISTMENT .....                     | 179     |
| Annotation I. In General .....                              | 179-180 |
| II. Specifications .....                                    | 181     |
| III. Proof .....  | 181-182 |
| IV. Variance .....  | 182     |
| ARTICLE 55. OFFICER MAKING UNLAWFUL ENLISTMENT .....        | 182     |
| Annotation .....  | 182-183 |
| ARTICLE 56. FALSE MUSTER .....                              | 183     |
| Annotation .....  | 183     |
| ARTICLE 57. FALSE RETURNS; OMISSION TO RENDER RETURNS ..... | 183     |
| Annotation .....  | 183     |

## CHAPTER XI

|  |         |
|--|---------|
| PUNITIVE ARTICLES—DESERTION; ABSENCE WITHOUT LEAVE ..... | 184     |
| ARTICLE 58. DESERTION .....                              | 184     |
| Annotation I. In General .....                           | 184-186 |
| II. Jurisdiction .....                                   | 186-187 |
| III. Removal of Charge .....                             | 187-188 |
| IV. Allegations and Proof .....                          | 188-192 |
| V. Variance .....  | 192-193 |
| VI. Attempt to Desert .....                              | 193     |
| VII. War-time Desertion .....                            | 193-194 |
| VIII. Drafted Men .....                                  | 194-195 |
| IX. National Guard and Volunteers ...                    | 195-196 |
| X. Punishment .....                                      | 196-197 |
| XI. Civil Disabilities .....                             | 197     |
| ARTICLE 59. ADVISING OR AIDING ANOTHER TO DESERT .....   | 197-198 |
| Annotation .....   | 198     |
| ARTICLE 60. ENTERTAINING A DESERTER .....                | 198     |
| Annotation .....   | 198     |
| ARTICLE 61. ABSENCE WITHOUT LEAVE .....                  | 198     |
| Annotation I. In General .....                           | 199-200 |
| II. Absence in Hands of Civil Authorities .....          | 200-201 |
| III. Restoration to Duty Without Trial .....             | 201     |

|   | Page    |
|---|---------|
| IV. Forfeiture of Pay .....                 | 201     |
| V. Other Offenses Involved .....            | 201-202 |
| VI. Proof .....                             | 202-204 |
| VII. Computation of Period of Absence ..... | 204     |
| VIII. Sentence .....                        | 204-205 |

## CHAPTER XII

|   |         |
|---|---------|
| PUNITIVE ARTICLES—DISRESPECT; INSUBORDINATION; MUTINY .....                 | 206     |
| ARTICLE 62. DISRESPECT TOWARD THE PRESIDENT, ETC. ....                      | 206     |
| Annotation .....  | 206     |
| ARTICLE 63. DISRESPECT TOWARD SUPERIOR OFFICERS ..                          | 206     |
| Annotation I. In General .....  | 207     |
| II. Other Offenses Involved .....   | 207     |
| III. Allegations and Proof .....  | 207     |
| ARTICLE 64. ASSAULTING OR WILFULLY DISOBEYING<br>SUPERIOR OFFICER .....     | 207-208 |
| Annotation I. In General .....  | 208-209 |
| II. Assault .....   | 209     |
| III. Disobedience .....   | 209-213 |
| IV. Other Offenses Involved .....   | 213     |
| V. Allegations and Proof .....  | 213-215 |
| VI. Jurisdiction .....  | 215     |
| ARTICLE 65. INSUBORDINATE CONDUCT TOWARD NON-<br>COMMISSIONED OFFICER ..... | 215     |
| Annotation .....  | 215-216 |
| ARTICLE 66. MUTINY OR SEDITION .....  | 217     |
| Annotation .....  | 217-219 |
| ARTICLE 67. FAILURE TO SUPPRESS MUTINY OR SEDITION ..                       | 219     |
| ARTICLE 68. QUARRELS; FRAYS; DISORDERS .....                                | 219     |
| Annotation .....  | 219-220 |

## CHAPTER XIII

|  |         |
|--|---------|
| PUNITIVE ARTICLES—ARREST; CONFINEMENT ...          | 221     |
| ARTICLE 69. ARREST OR CONFINEMENT .....            | 221     |
| Annotation I. In General .....                     | 221-222 |
| II. Who May Order .....                            | 223-224 |
| III. Arrest—Status, Limits, and Restrictions ..... | 224-225 |
| IV. Breaking Arrest .....                          | 225     |

|   | Page    |
|---|---------|
| V. Escape .....   | 225-227 |
| VI. Release from Arrest or Confinement .....                  | 227-228 |
| ARTICLE 70. CHARGES; ACTION UPON, UNNECESSARY DELAY .....     | 228     |
| Annotation .....  | 228     |
| ARTICLE 71. REFUSAL TO RECEIVE AND KEEP PRISONERS .....       | 228     |
| Annotation .....  | 228-229 |
| ARTICLE 72. REPORT OF PRISONERS RECEIVED .....                | 229     |
| ARTICLE 73. RELEASING PRISONER WITHOUT PROPER AUTHORITY ..... | 229     |
| Annotation .....  | 229     |
| ARTICLE 74. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES .....  | 229-230 |
| Annotation I. In General .....                                | 230-232 |
| II. When Surrender May Be Refused ..                          | 232-236 |
| III. Offenses Committed on Army Transports .....              | 236     |
| IV. Attendance as Witnesses in Civil Courts .....             | 236     |
| V. When Accused has Already Been Tried by Court-martial ..... | 236-237 |
| VI. Extradition of Soldiers .....                             | 237     |
| VII. Habeas Corpus .....                                      | 237-239 |
| VIII. Deserters .....   | 239     |
| IX. Service of Process in Civil Suits ....                    | 239     |

## CHAPTER XIV

|  |         |
|--|---------|
| PUNITIVE ARTICLES—WAR OFFENSES .....                                 | 240     |
| ARTICLE 75. MISBEHAVIOR BEFORE THE ENEMY .....                       | 240     |
| Annotation .....   | 240-242 |
| ARTICLE 76. SUBORDINATES COMPELLING COMMANDER TO SURRENDER .....     | 242     |
| ARTICLE 77. IMPROPER USE OF COUNTERSIGN .....                        | 242     |
| ARTICLE 78. FORCING A SAFEGUARD .....                                | 242-243 |
| Annotation .....   | 243     |
| ARTICLE 79. CAPTURED PROPERTY TO BE SECURED FOR PUBLIC SERVICE ..... | 243     |
| Annotation .....   | 243-244 |
| ARTICLE 80. DEALING IN CAPTURED OR ABANDONED PROPERTY .....          | 244     |
| Annotation I. Captured Property .....                                | 244     |
| II. Abandoned Property .....   | 244-245 |

|   | Page    |
|---|---------|
| ARTICLE 81. RELIEVING, CORRESPONDING WITH, OR AID-<br>ING THE ENEMY ..... | 245     |
| <i>Annotation</i> I. In General .....                                     | 246     |
| II. Relieving the Enemy .....   | 246     |
| III. Corresponding with the Enemy ...                                     | 246     |
| IV. Giving Intelligence .....   | 246-247 |
| V. Prisoners of War .....   | 247     |
| ARTICLE 82. SPIES .....   | 247     |
| <i>Annotation</i> .....   | 247-248 |

## CHAPTER XV

|  |         |
|--|---------|
| MISCELLANEOUS CRIMES AND OFFENSES .....  | 249     |
| ARTICLE 83. WILFUL OR NEGLIGENT LOSS, DAMAGE, OR<br>WRONGFUL DISPOSITION OF MILITARY<br>PROPERTY ..... | 249     |
| <i>Annotation</i> .....  | 249-251 |
| ARTICLE 84. WASTE OR UNLAWFUL DISPOSITION OF<br>MILITARY PROPERTY ISSUED TO SOLDIERS .....             | 251     |
| <i>Annotation</i> .....  | 251-252 |
| ARTICLE 85. DRUNK ON DUTY .....  | 253     |
| <i>Annotation</i> I. "Drunkenness" Defined .....   | 253     |
| II. "On Duty" Defined .....  | 253-254 |
| III. Drunkenness Not on Duty .....   | 254     |
| IV. Specifications .....   | 254-255 |
| V. Limit of Punishment .....   | 255     |
| ARTICLE 86. MISBEHAVIOR OF SENTINEL .....  | 255     |
| <i>Annotation</i> .....  | 255-257 |
| ARTICLE 87. PERSONAL INTEREST IN SALE OF PROVISIONS .....  | 257     |
| ARTICLE 88. UNLAWFULLY INFLUENCING ACTION OF<br>COURT .....  | 257     |
| <i>Annotation</i> .....  | 257-258 |
| ARTICLE 89. GOOD ORDER TO BE MAINTAINED AND<br>WRONGS REDRESSED .....                                  | 258     |
| <i>Annotation</i> .....  | 258-259 |
| ARTICLE 90. PROVOKING SPEECHES OR GESTURES .....   | 259     |
| <i>Annotation</i> .....  | 259     |
| ARTICLE 91. DUELING .....  | 259     |
| <i>Annotation</i> .....  | 259     |
| ARTICLE 92. MURDER; RAPE .....   | 259-260 |
| <i>Annotation</i> I. In General .....  | 260     |
| II. Murder .....   | 260-266 |
| III. Rape .....  | 266-267 |
| IV. Dishonorable Discharge .....   | 267-268 |

|  | <b>Page</b> |
|--|-------------|
| ARTICLE 93. VARIOUS CRIMES .....   | 268         |
| Annotation I. Assault with Intent to Commit a Felony .....               | 268-270     |
| II. Assault with Intent to Do Bodily Harm .....                          | 271-273     |
| III. Embezzlement .....  | 274-277     |
| IV. Forgery .....  | 277-279     |
| V. Housebreaking and Burglary .....                                      | 279-280     |
| VI. Larceny .....  | 280-284     |
| VII. Manslaughter .....  | 284-285     |
| VIII. Perjury .....  | 285-287     |
| IX. Robbery .....  | 287-288     |
| X. Sodomy .....  | 288-289     |
| ARTICLE 94. FRAUDS AGAINST THE GOVERNMENT .....                          | 289-291     |
| Annotation I. False Claims .....   | 291-292     |
| II. Stealing — Misappropriation — Misapplication .....                   | 292-296     |
| III. Other Frauds Against the Government .....                           | 296         |
| IV. Liability After Separation from Service .....                        | 297         |
| ARTICLE 95. CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN .....          | 298         |
| Annotation I. In General .....   | 298-300     |
| II. Relations with Officers and Men ...                                  | 300-301     |
| III. Cheating .....  | 301         |
| IV. Drunkenness and Disorderly Conduct                                   | 301-303     |
| V. Financial Affairs .....   | 303-305     |
| VI. False Official Reports or Statements                                 | 305-307     |
| VII. Domestic Relations .....  | 307-308     |
| ARTICLE 96. GENERAL ARTICLE .....  | 308         |
| Annotation I. In General .....   | 309-310     |
| II. Conduct to the Prejudice of Good Order and Military Discipline ..... | 310-314     |
| III. Conduct of a Nature to Bring Discredit upon the Military Service .. | 315-317     |
| IV. Crimes and Offenses Not Capital ..                                   | 317-320     |
| V. Substitution of the 96th for Other Articles .....                     | 320-322     |

## CHAPTER XVI

|  |     |
|--|-----|
| COURTS OF INQUIRY .....                    | 323 |
| ARTICLE 97. WHEN AND BY WHOM ORDERED ..... | 323 |
| Annotation .....                           | 323 |



|   | Page    |
|---|---------|
| ARTICLE 98. COMPOSITION .....                                     | 324     |
| Annotation .....  | 324     |
| ARTICLE 99. CHALLENGES .....                                      | 324     |
| Annotation .....  | 324     |
| ARTICLE 100. OATH OF MEMBERS AND RECORDER .....                   | 324     |
| ARTICLE 101. POWERS; PROCEDURE .....                              | 324-325 |
| Annotation .....  | 325-326 |
| ARTICLE 102. OPINION ON MERITS OF CASE .....                      | 326     |
| Annotation .....  | 326     |
| ARTICLE 103. RECORDS OF PROCEEDINGS; HOW AUTHEN-<br>TICATED ..... | 326     |
| Annotation .....  | 326     |

## CHAPTER XVII

|  |         |
|--|---------|
| MISCELLANEOUS PROVISIONS .....   | 327     |
| ARTICLE 104. DISCIPLINARY POWERS OF COMMANDING<br>OFFICERS .....                 | 327     |
| Annotation I. In General .....   | 328     |
| II. Applicable to Minor Offenses Only .....                                      | 328     |
| III. Who May Administer .....  | 328-329 |
| IV. Punishments .....  | 329-330 |
| V. Appeals .....   | 330     |
| VI. Subsequent Trial .....   | 331     |
| ARTICLE 105. INJURIES TO PROPERTY; REDRESS OF ....                               | 331-332 |
| Annotation I. In General .....   | 332-333 |
| II. Claims and Claimants .....   | 333-334 |
| III. Damages .....   | 334     |
| IV. Pro Rata Assessment .....  | 334-335 |
| V. Board's Award, as Approved by Com-<br>manding Officer, Conclusive .....       | 335     |
| VI. Priority .....   | 336     |
| VII. Assessment not Collected, Officer Re-<br>sponsible therefor Liable .....    | 336     |
| VIII. Collection in Subsequent Enlistment .....                                  | 336     |
| ARTICLE 106. ARREST OF DESERTERS BY CIVIL OFFICIALS .....                        | 336     |
| Annotation .....   | 336-337 |
| ARTICLE 107. SOLDIERS TO MAKE GOOD TIME LOST ...                                 | 337     |
| Annotation I. In General .....   | 338-339 |
| II. Time Lost in Desertion .....   | 339     |
| III. Time Lost While Absent Without<br>Leave .....                               | 339     |
| IV. Time Lost in Military Confinement .....                                      | 340     |
| V. Time Lost in Civil Confinement ...  | 340     |
| VI. Time Lost Through Disability Due<br>to Misconduct—"Line-of-Duty" Cases ..... | 340-347 |

|   | Page    |
|---|---------|
| ARTICLE 108. SOLDIERS; SEPARATION FROM THE SERVICE                      | 347     |
| <i>Annotation</i> I. In General .....                                   | 348-349 |
| II. Honorable Discharge .....   | 349-350 |
| III. Bad Conduct Discharge .....  | 350     |
| IV. Dishonorable Discharge .....  | 350-352 |
| V. Reasons for Discharge .....  | 352-353 |
| VI. Discharge by Purchase .....   | 353     |
| VII. Discharge for Disability .....                                     | 353     |
| VIII. Discharge for Fraudulent Enlistment                               | 353     |
| IX. Remarks upon Discharge Certificate                                  | 354     |
| X. Who May Order or Sign .....  | 354     |
| XI. Execution of Discharge .....  | 354-356 |
| XII. Cannot be Revoked Except for<br>Fraud .....                        | 356-358 |
| XIII. Lost Certificate .....  | 358-359 |
| XIV. National Guard in Federal Service ..                               | 359     |
| XV. Retired Enlisted Men .....  | 359     |
| ARTICLE 109. OATH OF ENLISTMENT .....                                   | 359-360 |
| <i>Annotation</i> .....   | 360-361 |
| ARTICLE 110. CERTAIN ARTICLES TO BE READ AND EX-<br>PLAINED .....       | 361     |
| ARTICLE 111. COPY OF RECORD OF TRIAL .....                              | 361     |
| <i>Annotation</i> .....   | 361-362 |
| ARTICLE 112. EFFECTS OF DECEASED PERSONS; DISPO-<br>TION .....          | 362     |
| <i>Annotation</i> I. In General .....                                   | 363-364 |
| II. To What Property Applicable .....                                   | 364     |
| III. Debts Due .....  | 364     |
| IV. Persons Entitled to Effects .....                                   | 364-366 |
| V. Disposition When Not Claimed or<br>When Claims are Conflicting ..... | 366-367 |
| VI. Property Subject to Lien .....                                      | 367     |
| VII. Transportation .....   | 367     |
| ARTICLE 113. INQUESTS .....   | 367-368 |
| <i>Annotation</i> .....   | 368-369 |
| ARTICLE 114. AUTHORITY TO ADMINISTER OATHS .....                        | 369     |
| <i>Annotation</i> I. In General .....                                   | 369-370 |
| II. Individuals Authorized .....  | 370-371 |
| III. Purposes Authorized .....  | 371-372 |
| IV. In Foreign Places .....   | 372     |
| V. Depositions .....  | 372     |
| VI. National Guard and Reserve Officers                                 | 372-373 |

|   | Page    |
|---|---------|
| ARTICLE 115. APPOINTMENT OF REPORTERS AND INTER-<br>PRETERS .....                                   | 373     |
| Annotation .....  | 373-374 |
| ARTICLE 116. POWERS OF ASSISTANT TRIAL JUDGE AD-<br>VOCATE AND ASSISTANT DEFENSE COUN-<br>SEL ..... | 374     |
| ARTICLE 117. REMOVAL OF CIVIL SUITS .....   | 374     |
| ARTICLE 118. OFFICERS; SEPARATION FROM SERVICE ...  | 374-375 |
| Annotation  |         |
| I. Discharge by Order .....   | 375-376 |
| II. Dismissal by The President .....  | 376-377 |
| III. Dismissal by Sentence of Court-<br>martial .....   | 377     |
| IV. Dropped from the Rolls .....  | 377-378 |
| V. Wholly Retired .....   | 378     |
| VI. Discharged under Sec. 24b, National<br>Defense Act .....  | 378     |
| VII. Resignation .....  | 378-381 |
| VIII. Acceptance of Civil, or Incompatible<br>Military, Office .....                                | 381     |
| IX. Discharge or Dismissal Cannot Be<br>Revoked .....   | 381-382 |
| X. National Guard and Reserve Officers  | 382-383 |
| XI. Warrant Officers .....  | 384     |
| ARTICLE 119. RANK AND PRECEDENCE AMONG REGULARS,<br>MILITIA AND VOLUNTEERS .....                    | 384     |
| Annotation .....  | 384     |
| ARTICLE 120. COMMAND WHEN DIFFERENT CORPS OR<br>COMMANDS HAPPEN TO JOIN .....                       | 384     |
| Annotation .....  | 384-385 |
| ARTICLE 121. COMPLAINTS OF WRONGS .....   | 385-386 |
| Annotation .....  | 386     |
| GLOSSARY OF LEGAL TERMS .....   | 387-388 |
| INDEX .....   | 389-408 |

## KEY TO REFERENCES

The Digest of Opinions of The Judge Advocate General of the Army, 1912, is cited by the figure "12" followed by numbers indicating pages.

The Digest of Opinions of The Judge Advocate General of the Army, 1912-1930, is cited by the figure "30" followed by numbers indicating paragraphs, those in the Supplement being preceded by "Sup."

The Digest of Opinions of The Judge Advocate General of the Army, 1912-1940, is cited by the figure "40" followed by numbers indicating paragraphs except when pages are indicated. Those in the Supplement (for 1941) are preceded by "Sup."

The Digests of Opinions of The Judge Advocate General of the Army beginning with 1942 have been published in bulletins paged consecutively through each year. These are cited by the figures indicating the years, followed by numbers indicating pages. For instance (43-17) indicates page 17 of the 1943 edition of the Digest of Opinions of the Judge Advocate General.

The Manual for Courts-Martial is cited by the initials "M.C.M." followed by numbers denoting paragraphs unless otherwise indicated. Citations are to the 1949 Manual.

Military Laws of the United States is cited by the initials "M.L.U.S." followed by numbers indicating paragraphs. Those in the Supplement are indicated by "Sup."

The Selective Service Act, 1948 is cited as "S.S.A. '48."

## CHANGES IN NOMENCLATURE

For "Secretary of War" read "Secretary of the Army" or "Secretary of the Department of the Army."

For "War Department" read "Department of the Army."

For "Judge Advocate General's Department" read "Judge Advocate General's Corps."

For "Army Air Force" or "Air Corps" read "United States Air Force."



## ENACTMENT OF THE ARTICLES OF WAR

The present Articles of War were originally enacted as part of the National Defense Act of June 4, 1920, and constitute Chapter 36, Title 10 of the Code of Laws of the United States of America, 1934 Edition. (M.L.U.S. 354 *et seq.*) The enacting clause provides that the Articles of War "shall at all times and in all places govern the Armies of the United States." Various Articles have been amended from time to time and substantial changes, effective February 1, 1949, were enacted in Title II of The Selective Service Act of 1948. (Public Law 759, 80th Congress.)

### ANNOTATION

1. This edition of ARTICLES OF WAR ANNOTATED includes all amendments of the Articles to February 1, 1949, and the Annotations have been revised to conform with the published Digests of Decisions of the Judge Advocate General of the Army to date and the new MANUAL FOR COURTS-MARTIAL 1949.

2. By Public Law 775 (80th Congress, June 25, 1948) the Articles of War were made applicable to the United States Air Force, under a separate system of military justice to be administered by The Judge Advocate General, United States Air Force. That Act provides, in pertinent parts, as follows:

"Sec. 1. There is hereby established in the United States Air Force the office of The Judge Advocate General, U. S. Air Force [which] shall be occupied by The Judge Advocate General, U. S. Air Force, with the rank of Major General, who shall be appointed by The President . . . The Judge Advocate General, U. S. Air Force, shall be charged with supervising the administration of military justice in the U. S. Air Force and the performance of such other legal duties as may be directed by the Chief of Staff, U. S. Air Force.

"Sec. 2. The Articles of War and all other laws now in effect relating to the Judge Advocate General's Department, the Judge Advocate General of the Army, and the administration of military justice within the United States Army shall be applicable to the Department of the Air Force with respect to the personnel thereof, and all references in such laws to the Department of the Army (War), the Army of the United States and its components, the Secretary of the Army (War), the Judge Advocate General, Assistants Judge Advocate General, and officers of or assigned to the Judge Advocate General's Department shall be construed for the purposes of this Act, as referring to, and vest-

ing like authority, duties, functions, and responsibilities in the Department of the Air Force, the Air Force of the United States and its components, the Secretary of the Air Force, the Judge Advocate General, United States Air Force, and officers of the United States Air Force designated by the Chief of Staff, United States Air Force, as judge advocates, respectively: *Provided*, That until the expiration of the transfer period [July 26, 1949] prescribed by section 208e of the National Security Act of 1947 (Public Law 253, 80th Congress), the jurisdiction conferred hereby may be exercised with respect to the personnel of any component of the Department of the Army who may be under the command and authority of the Chief of Staff, United States Air Force.

. . . . .

"Sec. 4. Nothing contained herein shall be construed to prevent the prosecution, punishment, mitigation, or other action, by the United States acting through officers of either the Department of the Army or the Department of the Air Force as to any offense made punishable by the Articles of War committed prior to the date of this Act by any person subject to military law, and either of those departments may enforce or mitigate any penalty, forfeiture, fine or liability, heretofore adjudged against such person."

This Act is hereinafter cited as the "Air Force Military Justice Act, 1948."

3. Military law is due process of law to those in the military service of the United States (*Reaves vs. Ainsworth*, 219 U. S. 296, and *U. S. ex rel. French vs. Weeks*, 259 U. S. 326). (M.C.M. 7).

## CHAPTER I

### PRELIMINARY PROVISIONS

*ARTICLE 1. DEFINITIONS: The following words when used in these articles shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:*

*(a) The word "officer" shall be construed to refer to a commissioned officer;*

*(b) The word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man or woman.*

*(c) The word "company" shall be construed as including a troop, battery, or corresponding unit of the ground or air forces.*

*(d) The word "battalion" shall be construed as including a squadron or corresponding unit of the ground or air forces.*

*(e) The word "cadet" shall be construed to refer to a cadet of the United States Military Academy. (As amended by S.S.A. '48.)*

### ANNOTATION

1. A warrant officer is not an "officer" as defined in this Article (30-301, 1899). Neither is a flight officer (43-17).

\* \* \*

*ARTICLE 2. PERSONS SUBJECT TO MILITARY LAW. The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles; Provided, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.*

*(a) All officers, warrant officers, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates*



*they are required by the terms of the call, draft, or order to obey the same;*

*(b) Cadets;*

*(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: Provided, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;*

*(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;*

*(e) All persons under sentence adjudged by courts-martial;*

*(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia. (As amended by S.S.A. '48, effective Feb. 1, '49.)*

## ANNOTATION

(See M.C.M. Chap. IV.)

|   |        |
|---|--------|
| I. OFFICERS, SOLDIERS, ETC.                         | Pars.  |
| IN GENERAL .....                                    | 1-5c   |
| RESERVES .....                                      | 6-8    |
| NATIONAL GUARD .....                                | 9-10   |
| RETIRED PERSONNEL .....                             | 11     |
| DRAFTED MEN .....                                   | '12-14 |
| II. CADETS .....                                    | 15-16  |
| III. MARINE CORPS AND NAVAL PERSONNEL ...           | 17-18  |
| IV. CIVILIANS                                       |        |
| IN GENERAL .....                                    | 19-21a |
| IN THE FIELD .....                                  | 22-26d |
| BETWEEN ARMISTICE AND DECLARATION OF<br>PEACE ..... | 27     |
| PRISONERS OF WAR AND INTERNED ENEMY<br>ALIENS ..... | 28-29d |
| V. MILITARY PRISONERS .....                         | 30-33  |
| VI. MEMBERS OF SOLDIERS' HOME ....                  | 34     |

## I. OFFICERS, SOLDIERS, etc.

### *In General*

1. As a general rule a court-martial has no authority to try a soldier for an offense committed prior to his entry into the military

service. There are certain exceptions: *i.e.* Art. 81 (Relieving the enemy, etc.) and Art. 82 (Spies) under which a court-martial has jurisdiction irrespective of whether the offenders are in the military service; and Art. 54 (Fraudulent enlistment) under which a soldier may be tried for fraudulent enlistment although, strictly, the fraud was committed before the enlistment was completed (30-1437) (40-369 [2]). (44-277).

1a. Members of a friendly (Canadian) military force at a United States military post (Fort Benning) by permission of our Government are not subject to our Articles of War nor to trial by our courts-martial. By international law (in the absence of a treaty provision or other special agreement to the contrary) they are immune from our courts both civil and military. They should be disciplined by their own officers and tried by their own courts martial. If they misconduct themselves, and no officer of their own forces authorized to act is present, they may be arrested and confined until they can be turned over to the authorities of their own Government. They may also be taken into custody and detained temporarily at the request of such authorities (43-7). (M.C.M. 11).

2. Separation from the service terminates the jurisdiction, except for certain offenses which, under Article 94 (Frauds Against the Government), may be tried by court-martial after such separation (12-515; 30-1325, 1436) (40-359 [1] [2], 46-35). However, once the soldier has been arrested or had charges served upon him before separation, he may be held for trial by court-martial even if his term of enlistment has expired in the meantime. (12-511, 546; 30-1326). A soldier who commits an offense on the day he is due for discharge, but before the discharge is executed, is still subject to military jurisdiction (12-511). A court-martial has no jurisdiction to try a soldier for an offense, other than one covered by Article 94 (Frauds Against the Government), committed in a prior enlistment from which he has been discharged (30-Sup. 1436) (47-295). An officer dropped from the rolls (49-5) under the last clause of Article 118 (Officers, Separation from Service), cannot be tried by court-martial except as provided by Article 94 (Frauds) (30-1325); but suspension from rank and command does not affect the military jurisdiction of the court (12-513) (40-359, 369).

2a. An enlisted man discharged to accept appointment as flight officer, which he accepted, went absent without leave, and while so absent, his appointment as flight officer was terminated by a special order promulgated by the authority which made the appointment. Later he was apprehended and another order was issued purporting to revoke the order terminating the appointment. Held: The order terminating the appointment became effective upon its promulgation and could not be revoked subsequently. In view of his absence with-

out leave no notice to the soldier was necessary. In the absence of any reserve status, he was a civilian, and could not be tried for absence without leave. A similar ruling has been made as to warrant officers (44-1). But see Art. 108, Anno. par. 37, 38, 39.

3. A fraudulent enlistment is voidable only at the option of the government, and consequently an enlisted minor is subject to trial by court-martial for an offense committed prior to his formal discharge (30-351, 1330). Whether he should be held for trial is a question for administrative determination (30-246) (40-248, 359 [3]).

4. A mere change in status, without a break in the military service, such as promotion, transfer, or, in the case of an officer, change from a temporary to a permanent commission, does not terminate the military jurisdiction (30-1435, Sup. 502 b). An officer promoted from the ranks with no break in his service, may be tried for offenses committed when an enlisted man (30-236, 1435). An officer may also be tried by court-martial for an offense committed while a cadet, provided there was no break between his cadet service and his commissioned status (12-515, 516) (40-369 [3]). (45-223).

4a. Soon after the passage of the National Security Act of 1947 (P.L. 253, 80th Congress, July 26, 1947) it was held by The Judge Advocate General of the Army that, under certain provisions of that Act, and A.W. 2, the members of the U.S. Air Force, being still in "the military service of the United States," and there being (at that time) no separate system of military justice for the Air Force, were still subject to the jurisdiction of Army courts-martial and the Articles of War (48-10). Under the Act of June 25, 1948 (see Enactment of the Articles of War, Annotation, par. 2) the personnel of the U.S. Air Force, although still subject to the Articles of War, are not subject to trial by Army courts-martial except for offenses committed prior to June 25, 1948. (M.C.M. App. 1, Notes to A.W. 2).

5. An honorable discharge pertains only to the particular enlistment to which it relates and releases the soldier from amenability for all offenses committed only within that particular term (except under Article 94) (12-515). A dishonorable discharge is a complete expulsion from the service and relates to no particular term, and covers all unexpired enlistments. A dishonorably discharged soldier cannot be tried for offenses committed prior to such discharge (except as provided in Article 94). A subsequent enlistment after dishonorable discharge does not revive the military jurisdiction over such offenses (12-515; 30-1326). However, a dishonorably discharged general prisoner, still in confinement under sentence of court-martial, can still be tried for offenses committed prior to discharge (30-1326), because the dishonorable discharge terminated his status as a soldier but did not terminate the military jurisdiction while serving sentence (30-1383) (40-369 [4]).

5a. When a soldier is discharged for the convenience of the government, but the certificate is not given him until after his reenlistment, military jurisdiction over him is continuous (42-13).

5b. A dishonorably discharged soldier becomes a civilian even though retained in confinement under sentence of a general court-martial (42-100). This is covered by subdivision (e) of the Article.

5c. By the act of July 1, 1943 (M.L.U.S. Sup. 2286) the Women's Army Corps was established as a component of the Army of the United States. Enlisted members of this Corps are "enlisted men" within the meaning of the statute (M.L.U.S. Sup. 180a) authorizing the detail of enlisted men of the Army as "Army mail clerks" (43-266). Members of the Women's Army Corps are punishable by the military authorities under the Articles of War only. Disciplinary action against them by a "summary board" under the Women's Army Auxiliary Corps regulations is illegal and void (43-484). Members of the Women's Army Corps (as distinguished from the Women's Army Auxiliary Corps) are "persons lawfully called, drafted or ordered into" the military service and are "persons subject to military law." See also Art. 115, Annotation, par. 2a.

### *Reserves*

6. Reserve officers are subject to military law only when on active duty (30-99, 1336). They are not so subject when in an inactive training status (30-1336). A reserve officer on active duty is not subject to trial by court-martial for acts committed when not on active duty, but he may, at the discretion of the President (under Sec. 37, N. D. Act, M.L.U.S. 1358a) be summarily discharged (30-297). A reserve officer on active duty with the Civilian Conservation Corps is subject to military law (30-Sup. 1336) (40-359 [6], Sup. 359 [6]).

A member of the Enlisted Reserve Corps is not subject to military law until he has been lawfully ordered to active duty, and he has been actually, or constructively, notified thereof. The mailing of the orders to his address is not constructive delivery in the absence of any showing that he had received them (44-449, 450).

7. Court-martial jurisdiction over a reserve officer is not terminated by the expiration of his tour of active duty, and he may be held under military control until the final disposition of the case (30-Sup. 1336) (40-359 [6]). But the transfer of a reserve or A.U.S. officer to an inactive status pending actual service of charges upon him terminates the court-martial jurisdiction over him (46-35, 122). And an honorable discharge after trial and sentence to dismissal, but before action by the confirming authority, constitutes a constructive pardon or remission of the sentence (46-278).

An officer on "terminal leave" is in an "active duty status," and therefore subject to the military jurisdiction, until the expiration of such leave (48-177).

8. Reserve nurses on active duty are subject to military law (30-1932) (40-78).

#### *National Guard*

9. National Guard officers attending a service school are not "in the military service of the United States" within the purview of the articles of war and, therefore, are not subject to trial by court-martial appointed by Federal authority (30-1331, 1355) (40-359 [5]).

10. Members of the National Guard are subject to military law from the date they are called, ordered, or drafted into Federal service (30-23, 291, 293, 1332). A National Guardsman who fails to respond to a "call" of the President may be tried for desertion even if he subsequently served as a drafted man and was honorably discharged (30-1499). National Guardsmen who were first "called" and later "drafted" can be tried for offenses committed while serving under "call" after they were "drafted," their service having been continuous (30-1332) (40-359 [4], 369 [4]).

#### *Retired Personnel*

11. Retired officers of the Regular Army are subject to military law and to trial by court-martial for offenses committed either before or after retirement, subject to the limitations imposed by Article 39 (Limitations Upon Prosecutions—as to Time) (12-992). Retired enlisted men of the Regular Army are subject to military law (12-1001, 1003) (40-Sup. 359 [6a]).

#### *Drafted Men*

12. Under the law in force in 1918 a drafted man who, upon being ordered by his local board or the State Adjutant General to report for military duty, failed to report at the time and place specified, and intentionally remained absent, was chargeable with desertion (30-2232) (40-416 [18]); but under the Selective Training and Service Act of 1940 drafted men are not subject to military law until they have been accepted for, and inducted into, the military service at an induction station. Offenses and delinquencies of which they may be guilty under the selective service law prior to such induction are punishable by the U. S. Civil Courts (Sel. Tr. and Ser. Act, 1940, Secs. 3 (a) and 11; M.L.U.S. 2225). (See also S.S.A. '48, Sec. 12a). But a drafted man who is inducted into the Army and, on the same day, is relieved from active duty and furloughed to the enlisted reserve with instructions to report back for active duty on a certain date (see sec. 4, act of Aug. 18, 1941; M.L.U.S. Sup. 2227-4, and regulations thereunder) does not become subject to military law until the date on which he is ordered to report back for active duty, and is not in an active duty status until he is due to comply with his orders to report for active duty (43-205-207).

12a. Upon acceptance by the military authorities at an induction station the induction of a drafted man is complete by operation of law. The taking of the oath prescribed by Article 109 is not a necessary formality for drafted men (42-344 (43-40, 287) (45-420). See Art. 109, Anno. par. 3a.

12b. The fact that a drafted man entered this country illegally is immaterial if his induction is otherwise lawful. He may be retained in the service (42-344). But an enemy alien who is inducted into the service, released from active duty, and transferred to the enlisted reserve, may not be compelled to enter upon active duty if he objects thereto in writing (43-334).

13. If, on trial of a drafted man by court-martial, the question of jurisdiction is raised, it is incumbent upon the prosecution to prove that the accused has been inducted into the military service (45-420). If and when it becomes necessary to prove induction, a court-martial need not go behind the record of induction unless some material defect in the record is obvious (30-2238, 2239) (40-416 [19]).

14. A drafted man, or one who enlists "for the period of the emergency," who, when the emergency ends, is in confinement under a suspended sentence of dishonorable discharge, may be held to serve out his sentence (30-1605) (40-359 [15]).

## II. CADETS

15. The term "cadet" as used in the articles of war applies only to cadets at the U. S. Military Academy. Flying cadets (i.e., aviation cadets) constitute a special grade of enlisted rank not included in the term as here used (30-595) (40-359 [7] Sup. 359 [7]) (See Art. 14, Anno. par. 2).

16. Cadets are subject to trial by court-martial for infractions of the Military Academy regulations as constituting "conduct to the prejudice" etc. in violation of A.W. 96 (12-82).

## III. MARINE CORPS AND NAVAL PERSONNEL

17. Marine Corps and Naval personnel traveling on Army transports, but not "detached for service with" the Army, although subject to Army Transport Regulations, are not subject to trial by Army courts-martial (30-1333) (40-359 [8]). There is no authority whereby military personnel serving on a naval vessel may be subjected to disciplinary action by the naval officer in command thereof (44-226).

18. Members of the Marine Corps convicted by Army courts-martial while serving with the Army remain under jurisdiction of the War Department for all purposes of punishment, including dishonorable discharge, the same as similarly convicted men of the

army (30-1604), unless transferred back to the Navy Department (40-407 [3]).

#### IV. CIVILIANS

##### *In General*

19. Any statute which attempts to give jurisdiction to military courts over civilians *in time of peace* is unconstitutional (12-513). The articles of war are a code for the government of the military establishment and relate only to persons belonging thereto unless a different intent is clearly expressed or otherwise manifested. Military jurisdiction is exercised over civilians by virtue of the power of martial law and does not depend upon legislation but upon necessity. So it has been held that even under Articles 81 (Relieving, Corresponding with, or Aiding the Enemy) and 82 (Spies), whose application is not restricted to persons subject to military law, the jurisdiction over civilians should be limited to acts committed within the theatre of war or a district under martial law (12-128, 129, 152, 513). However, it was not so limited during the First World War (30-1337), 1437) (40-359 [9]). And it has been further extended in World War II. A complete list of the categories of civilians and types of civilian positions which have been held to be subject to military law under this Article, and corresponding provisions of earlier Articles of War, is published in The Bulletin of The Judge Advocate General of the Army for June, 1945, pages 223-228.

19a. Military tribunals have jurisdiction over two classes of offenses committed by civilians in the enemy's country during its occupation by our armies and while it remains under military government (12-1067) viz. (a) violations of the laws of war (42-260; 46-33), and (b) civil crimes, when the civil authority is superseded by the military. Furthermore, in occupied Japan (after cessation of hostilities) military tribunals have jurisdiction over American nationals notwithstanding that the local criminal courts are open for the trial of Japanese nationals, because it is contrary to our national policy to permit the courts of a conquered and occupied enemy country to try American nationals; but such military tribunals have no jurisdiction over purely military offenses committed by persons who are not "subject to military law." An American citizen, member of the crew of a merchant vessel, who arrived in Japan in July, 1946 (such vessel not being owned by, or allocated to, the Army, or under Army control or carrying military personnel or cargo) was held to be a person not subject to military law, and his trial and conviction for an offense in violation of Article 96 (which, as alleged, was not an offense of a civil nature) was held to be void for lack of jurisdiction (47-117-119).

19b. In time of war "all persons accompanying or serving with the Armies of the United States" at home or abroad are subject to military law. In time of peace only those "accompanying or serving with the Armies of the United States" abroad are so subject. Although a person "accompanying" the armies may also be "serving with" them, the distinction is important because he continues to be subject to military law while "accompanying" the army even though his contract of employment was ended before he committed an offense. Conversely, one may be "serving with" the armies without "accompanying" them. The words "serving with" are interpreted in the light of their common meaning, and comprehend "employment" by the armies in any respect. The nationality of a civilian "accompanying or serving with" the Army is immaterial upon the question of his subjection to military law (48-125-127).

20. Prior to the First World War the military jurisdiction over civilians was applied principally to those serving in a quasi-military capacity with troops in the theatre of war, such as teamsters, watchmen, employees of the supply departments, telegraphers, interpreters, guides, contract surgeons, railroad and transport employees, etc. Officers' servants and camp followers generally were rarely, if ever, subjected to trial by courts-martial (12-151).

20a. Members of the Army Specialist Corps (a corps of uniformed civilian employees established by Executive Order 9078 February 26, 1942) are subject to military law when they accompany or serve with the armies of the United States in the field in time of war, both at home and abroad (42-131).

21. Military jurisdiction over a civilian cannot be presumed. The facts necessary to establish it must be shown in evidence (30-1285) (40-359 [14]).

21a. Civilian employees serving with the armies in the field in time of war are subject to trial by either general or inferior courts-martial. It is important that all pertinent evidence of the jurisdiction in such cases be included in the records of general and special courts, and attached to the charge sheets in summary court trials (42-362). The limitations on punishment prescribed in M. C. M. 117 and the jurisdictional limitations on special and summary courts under Articles 13 and 14 are applicable to civilians as well as soldiers (45-7).

### *In the Field*

22. During the First World War the jurisdiction of courts-martial over civilians was not restricted to the actual theatre of war. A contract surgeon serving with the army in Texas was held to be "serving with the Armies of the United States in the field" and therefore subject to the military jurisdiction (30-1435). Contract surgeons were



also held subject to military law as a part of the Medical Department of the Regular Army (30-594). It was also held that those employed along the lines of communication were "serving with the armies in the field" and as ports of embarkation were a part of the lines of communication, civilian employees at such ports (in the United States) were subject to military law. Civilian employees of a contractor engaged in certain emergency work for the A. E. F. in France, who were on government payrolls, were held subject to military law (30-1323) (40-359 [d]).

22a. A civilian employee of a contractor engaged in construction at an Army leased base in a British possession, is subject to military law and may be tried by court-martial for an act of sabotage under Article 96 (42-357). Upon a petition for *habeas corpus* brought in the U. S. District Court for the Southern District of New York, a civilian employee of an aircraft company engaged in connection with the operation of an overseas military aircraft depot used by American and British forces, under supervision of U. S. Army officers, was held subject to trial by court-martial for larceny in violation of Article 93 (Various Crimes) although at the time of the offense he was not on duty and was in a city a number of miles from the depot, but his employment had not been terminated. The further fact that he had worked upon British planes only was held to be immaterial (43-337, 338). A civilian employee of an Army contractor working on salvage operations in an African port under supervision of an Army officer was discharged from such employment. Under the terms of his contract of employment entered into in the United States he was entitled, if discharged abroad, to transportation and subsistence back to the United States. While awaiting transportation back home he stole some jewelry from another civilian. The next day he sailed for the United States but was apprehended and taken off the boat at an Egyptian port, brought before a general court-martial in Egypt by which he was convicted and sentenced to ten years' confinement. Later his petition to a U. S. District Court in Pennsylvania for a writ of *habeas corpus* was denied, the court holding that, under the circumstances of the case, he was "accompanying the armed forces" while he was still in Africa notwithstanding his discharge from his job; and that once the military jurisdiction attaches to a person, the location of the court-martial by which he is tried is immaterial (44-416) (45-462, 48-70). A civilian custodian of an air field in a foreign country was held subject to military law although the nearest U. S. Army troops were at a Signal Corps post several miles away (45-271).

22b. A civilian member of the crew of an Army transport committed larceny. While awaiting trial by court-martial he escaped from confinement. He was apprehended and brought to trial for the

larceny and the escape, and his conviction of both charges was sustained. At the time of the larceny he was "serving with the Armies of the United States in the field" and subject to military law. The jurisdiction of the court-martial having attached, he was under such jurisdiction when he escaped (45-3). A merchant seaman employed on a vessel owned by the United States assigned for use of the Army and used in transporting military cargo from England to France in 1944 was held by a U. S. District Court to be subject to military law (45-484).

23. The words "in the field" do not refer to land only, but to any place, land or water, apart from permanent posts or fortifications where military operations are being conducted. The following classes of persons have been held subject to military law under this Article: Civilian employees on mine planters and transports (30-1322); all persons on board Army transports, either passenger or freight, or on any vessel operating under the jurisdiction of the War Department for purposes connected with the operations of the Army; and on other vessels, all persons of the classes made subject to military law by this Article (30-1334) (40-359 [d], 369 [6]). But see Article 74, Annotation, par. 29.

23a. A civilian member of the crew of an Army transport in a foreign port is a person serving with the armies in the field (42-357). Persons in the Army Transport Service are "serving with the armies of the United States in the field" and are subject to the Articles of War and may be tried by court-martial for offenses committed on the high seas or in port. The fact that the accused was not aware of his amenability to military law is no defense (43-137). (44-6, 139) (45-3, 229). When one's connection with the Army is such that he is subject to military law (i.e. an American merchant seaman on an American vessel in an Army convoy on the high seas) there is no constitutional objection to his trial by court-martial (44-135). He may be sentenced by court-martial to a forfeiture of pay, and it is the duty of all officers, employees and agents of the executive branch to comply with such sentence, if regular on its face, and withhold the pay (44-334).

24. In the First World War civilian employees in army cantonments in the United States were held subject to military law for both military and civil crimes, but whether the military jurisdiction should be enforced was a question of policy to be decided by the military authorities. It was enforced in several instances (30-1323) (40-359 [d]).

25. Personnel of the American Red Cross are subject to military law "when accompanying the armies of the United States outside the territorial jurisdiction of the United States or in the field within the United States" (30-2202) (40-359 [14]). Civilian passengers traveling

on War Shipping Administration vessels allocated to the Army, carrying military personnel or cargo are persons "accompanying the Armies of the United States," and are subject to military law while on such voyage, although they may not be "serving with" the Army (44-377).

25a. Newspaper correspondents officially accredited to the Army are not persons enlisted in, or appointed to, the military forces; but they are "civilians permitted to accompany an army of the United States in the field" (42-212) (47-8).

25b. Civilian employees of independent Government agencies of the United States serving in an overseas theater of operations in time of war are subject in all respects to the regulations and orders of the Commanding General of the United States forces in the theater, and may be tried and punished for violations thereof by military tribunals established by him. They are exempt from the jurisdiction and immune from the process of the local (foreign) courts, civil and criminal (43-234, 235).

25c. A commissioned officer of the Public Health Service detailed for duty with the Army is subject to military law except insofar as it is in terms or by necessary implication inapplicable to him. He is a belligerent under international law if he wears the prescribed military uniform and identifying insignia (43-326). By the act of July 1, 1944 (Pub. Law 410, 79th Cong., Sec. 216; M. L. U. S. 2170) the President is authorized by Executive Order in time of war to transfer the commissioned corps of the Public Health Service to the military forces and prescribe the extent to which they shall be subject to the Articles of War.

26. Civilian employees of the Ordnance Department stationed at manufacturing plants not operated by the War Department are not subject to military law (30-1323). A civil service employee of the Quartermaster Corps stationed at a permanent military post cannot be summarily punished for neglect of duty (30-1321) (40-359 [9]).

26a. Civilian employees of an automobile manufacturer sent by their employer into the military theater of operations to observe the performance of its products under combat conditions, who act merely as observers, are non-combatants; if they engage in repair work they become members of the armed forces and subject to the laws of war (42-1, 2).

26b. Civil Air Patrol pilots serving in cooperation with the Army Air Corps are "serving with the Army of the United States in the field" within the meaning of this Article, and are subject to military law in time of war (42-12).

26c. A civilian policeman, employed by a contractor on construction work at an Army base leased from Great Britain to guard dynamite, who left his place of duty without authority, was held triable by court martial for a violation of Article 96 (42-12).

26d. A civilian employee of the Army at a leased base in a British colony was arrested by United States guards for unlawful possession of a map and turned over to the colonial authorities who prosecuted him for violation of local defense regulations. Held that he was subject to trial by court-martial, but that since he was surrendered to the colonial authorities, being a civilian, he was not entitled, as of right, to be represented by United States counsel not admitted to practice before the colonial court (42-255, 256).

*Between Armistice and Declaration of Peace*

27. In the First World War, after the armistice, the military jurisdiction over civilians, though still in effect, was not generally asserted. When a civilian employee murdered another civilian employee at Camp Forrest, Georgia, on June 27, 1919, it was recommended that, "in view of the reestablishment of conditions approximating peace," the accused be not tried by court-martial although, being still time of war, he was subject to military law (30-1430).

*Prisoners of War and Interned Enemy Aliens*

28. Prisoners of war, though not in the military service of the United States are subject to trial by courts-martial (general, special or summary) on the same terms as our own forces, for military offenses and offenses of a civil nature (40-369 [7]; 43-5135; 44-331; 46-263; 47-277). Trial by summary court-martial of a prisoner of war is not a "judicial prosecution" within the meaning of Article 60 of the Geneva Convention requiring notice to the protecting power (44-135). Prisoners of war captured by allied forces and transferred to, and interned in a camp, in the United States for safekeeping, are subject to trial by a U. S. court-martial for violations of our Articles of War (44-465). A prisoner of war may be tried by military commission for violations of the laws of war committed by him while a combatant (46-33). A prisoner of war who is alleged to have struck or disobeyed an officer, or non-commissioned officer of the U. S. Army having custody or supervision of the accused may be charged under A.W. 64 or 65. Likewise, in appropriate cases, charges against prisoners of war may be laid under A.W. 63, 66, 92, 93 or 96 (45-329).

29. Interned enemy aliens are subject to trial by military tribunals (See Arts. 12 and 15) for offenses committed by them "within the prison limits" (30-1329, 2211). Offenders under Articles 81 (Relieving, etc. the enemy) and 82 (Spies) are subject to military jurisdiction (30-1337, 1437) (40-369 [5] [8]). By agreement between the United States and the Axis Nations (Germany, Italy and Japan) effected through the Swiss Government, civilian internees are to be treated according to the provisions of the Geneva Convention of July

27, 1929, relating to prisoners of war, insofar as those provisions are applicable to civilians. It follows that a civilian internee may be tried by court-martial for a violation of the Articles of War. The international agreement above referred to confers the jurisdiction, and A.W. 12 (Jurisdiction of General Courts-Martial) gives to general courts-martial the authority to exercise it. A civilian internee is a "person who by the laws of war is subject to trial by military tribunals" as that phrase is used in Article 12, and an internee who commits an assault upon an officer of the U. S. Army with a dangerous instrument may be tried by general court-martial for an assault with intent to do bodily harm with a dangerous weapon in violation of Article 93 (Various Crimes). While Article 15 (Military Commissions and Provost Courts) might also be applied in the instant case, trial by general court-martial is believed preferable because the procedure of military commissions and provost courts are not, in all respects, subject to the same rules of evidence and modes of review as general courts-martial, and there should be no question but that a prisoner of war or a civilian internee is awarded all the rights which pertain to members of our own armed forces accused of similar offenses. The case of an enemy who, prior to being captured, commits acts in violation of the laws of war is quite a different matter. Such person, if apprehended, may be tried as well by a military commission as by a general court-martial (43-51-55) (45-329; 46-33). See Article 45, Annotation, par. 1 as to limitations on punishments of prisoners of war and internees. See Article 42, Annotation, par. 2 as to places of confinement.

29a. Home Guards and civilian guards at Army depots, when properly uniformed and equipped and acting under a responsible commander in accordance with the laws and usages of war, are, in the event of capture by the enemy, entitled to be treated as prisoners of war (42-1, 97). Civilian employees of independent Government agencies serving in an overseas theater of war, when uniformed as prescribed by the Commanding General of the U. S. Forces in the theater and carrying papers of identification issued by the military authorities, are entitled to treatment as prisoners of war if captured by the enemy, provided that, if they are wearing non-combatant sleeve emblems, they carry no arms, or if wearing combatant insignia, they carry arms, if any, openly, and conduct themselves according to the laws and usages of war (43-235).

29b. Prisoners of war, interned enemy aliens, and interned United States citizens of enemy (Japanese) descent may not be employed against their will in work directly related to war operations (e. g. making camouflage nets) either with or without pay (42-1). The personal property of prisoners of war, or interned enemy aliens, may not be confiscated or destroyed. It may be temporarily removed

from their possession (42-259). They should be allowed to retain in their possession such personal property as is worn or carried about the person except arms, military equipment and military papers. They are not entitled to more "effects" than are reasonably expected to accompany soldiers taken prisoner in battle or in garrison, nor more than can reasonably be accommodated in the space allotted them which, under the Geneva Convention, is the same as for the depot troops of the detaining power. Detained American citizens should be given at least as favorable consideration in this respect (43-1). Prisoners of war may be furnished to private contractors for farm labor under an agreement by which the Government reserves the responsibility for their care, treatment, supervision, and pay (43-299).

29c. An alien soldier of the United States who has declared his intention to become a citizen may be sent on foreign duty, but if captured by forces of the country of his citizenship he would not be entitled to be treated as a prisoner of war. It is the War Department policy that steps be taken to complete naturalization in such cases under the Nationality Act of 1940 as amended by the Second War Powers Act of 1942 (42-192).

29d. A United States citizen of Japanese descent was arrested for violation of an order of the military authorities requiring him to leave a certain prescribed "military area." He brought a petition for a writ of *habeas corpus* on the ground that the "military area" prescribed contained territory which had no reasonable relation to military operations. The Federal District Court (Wisconsin) denied the writ, holding that "the courts, having insufficient information upon which to base a decision as to the military necessity of prescribing a military area, will not inquire into the question (42-382). It has been held by the U. S. Supreme Court that Congress and the Executive, acting in cooperation, have constitutional authority to impose restriction upon a citizen's liberty when military necessity so requires, and that under the act of March 21, 1942 (M.L.U.S. 2180a) race and ancestry may be a proper ground for discrimination in the exercise of such war power when relevant to the protection of the country from espionage and sabotage (43-252, 253; 44-535, 536; 45-257, 258).

## V. MILITARY PRISONERS

30. Persons subject to military law come under the jurisdiction of courts-martial for offenses committed by them while in arrest or confinement awaiting trial (12-512, 513). Military prisoners, even though discharged as soldiers, are subject to military law, and when there has been no lapse in the military control, such jurisdiction extends to offenses committed by them prior to their discharge (30-

1326). In such case the discharge terminates the status as a soldier but does not terminate the military jurisdiction while serving a court-martial sentence to confinement (30-1383) (40-359 [15]).

30a. An escaped general prisoner who is under sentence of a general court-martial including dishonorable discharge, is still subject to military law and, upon being apprehended and returned to military control, may be tried by court-martial for offenses committed by him while he was absent, whether or not the dishonorable discharge has been executed. He may also be tried for desertion committed when he escaped if the dishonorable discharge had not, at that time, been executed (44-225, 226). A dishonorably discharged general prisoner is liable to trial and punishment by court-martial for a violation of Article 64 (Assaulting or wilfully disobeying Superior Officer) (44-233).

31. A military prisoner whose term of enlistment expires while serving a sentence to confinement is not automatically discharged from the service. It requires formal action to terminate his military status (30-277). A prisoner who escapes while serving a sentence of court-martial under a suspended dishonorable discharge may, upon his return to military control, be tried for desertion (30-1328). It has been settled since 1876 that a military prisoner who escapes may, upon his recapture, be held to serve out the portion of his sentence remaining unexecuted at the time of his escape (30-1386) (40-359 [15], p. 985). (45-10).

32. A military prisoner under cumulative sentences, although dishonorably discharged at the expiration of his first sentence, may be held to serve out his remaining sentence or sentences (30-1383) (40-p. 985). And if, when dishonorably discharged he was mistakenly released from custody, he may be re-apprehended and held to serve out his remaining sentence or sentences (48-10, 11).

33. A discharged soldier serving a court-martial sentence in a state or territorial penitentiary is still subject to military control, at least so far as mitigation or remission of his sentence is concerned (12-569).

## VI. MEMBERS OF THE SOLDIERS' HOME

34. Members of the Soldiers' Home are civilians and not subject to military law. The provision in this Article purporting to place them under the military jurisdiction has been held unconstitutional and a "dead letter" (12-1010).

## CHAPTER II

### COURTS-MARTIAL—CLASSIFICATION AND COMPOSITION

*ARTICLE 3. COURTS-MARTIAL CLASSIFIED. Courts-martial shall be of three kinds, namely:*

*First, general courts-martial;*

*Second, special courts-martial; and*

*Third, summary courts-martial.*

*ARTICLE 4. WHO MAY SERVE ON COURTS-MARTIAL. All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial.*

*All warrant officers in the active military service of the United States and warrant officers in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts-martial for the trial of warrant officers and enlisted persons, and persons in this category, shall be detailed for such service when deemed proper by the appointing authority.*

*Enlisted persons in the active military service of the United States or in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts-martial for the trial of enlisted persons when requested in writing by the accused at any time prior to the convening of the court. When so requested, no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one third of the total membership of the court. (See also Art. 16).*

*When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command and when eligible those enlisted persons of the command who, in his opinion,*



*are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers and enlisted persons having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of minority membership thereof. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution. (As amended by S.S.A. '48 effective Feb. 1, 1949).*

(Note: The provisions for the appointment of warrant officers and enlisted persons as members of general and special courts-martial are new. Members of the Navy or Air Force are not competent to serve on Army Courts-martial (M.C.M. 4). Under Article 16 a soldier who is a member of the same company, or corresponding unit, as the accused may not sit on the court. The last sentence of this Article was formerly in Article 8.)

### ANNOTATION

|                               | Pars. |
|-------------------------------|-------|
| I. IN GENERAL .....           | 1-5a  |
| II. CHAPLAINS .....           | 6     |
| III. RETIRED OFFICERS .....   | 7     |
| IV. RESERVE OFFICERS .....    | 8     |
| V. NATIONAL GUARD .....       | 9     |
| VI. PERSONS DISQUALIFIED      |       |
| ACCUSER .....                 | 10-14 |
| WITNESS FOR PROSECUTION ..... | 15-16 |

### I. IN GENERAL

1. The president of the court is not designated as such in the convening order. The senior member participating in the proceedings acts as president (12-508).

2. As president, the presiding officer of a court-martial has no powers of command; he gives the directions necessary for the orderly and proper conduct of the proceedings, and if a member fails to comply it may constitute conduct "to the prejudice" etc., in violation of Article 96, but he cannot be charged under Article 64 for "willful disobedience of a lawful command" (12-508).

3. If the organization to which a member belongs is incorrectly given in the convening order, the validity of the proceedings is not affected if the description given is sufficient to identify the officer (12-571, 572).

4. A court-martial has no authority to excuse a member from attendance (30-1342) (40-395 [46]). An absent member is accountable to the appointing authority for failing to be present, but he should

give the cause of absence to the president of the court so that it may be entered in the record. If he fails to offer an explanation he may be requested by the court to do so. (12-507). But if the court assumes authority and does excuse a member or members, the validity of the proceedings will not be affected so long as the prescribed quorum remains, unless it is shown that such action was prejudicial to the defense (12-509).

5. Separation from the service automatically relieves a member from the court (12-507); and if one who has been relieved as a member continues thereafter to sit as a member the proceedings of the court will be void because the court was illegally constituted (12-572; 30-1352). The same is true if an officer sits as a member who has not been detailed on the court (30-1351) (40-365 [1]). But a member may continue to sit on the court after his transfer to another command. There is no requirement that the members of a court-martial must be under the command of the appointing authority at the time of trial (46-64).

5a. An order detailing an officer as a member of a court-martial cannot operate retrospectively. The participation as a member of a court of an officer who had not been detailed renders the proceedings void, although an order is subsequently issued detailing the officer as such member of the court as of a date prior to the trial (42-15) (43-338). The participation of such unauthorized person for only a part of the proceedings renders the entire proceedings null and void (46-120).

## II. CHAPLAINS

6. Chaplains are eligible for detail on courts-martial, but they are not usually detailed (12-492) (M.C.M. 4).

## III. RETIRED OFFICERS

7. Retired officers on active duty are eligible for duty as members of courts-martial. If so detailed their relief from active duty automatically terminates their memberships on the court (12-997; 30-1340, 1356). (40-224).

## IV. RESERVE OFFICERS

8. Reserve officers on active duty may be detailed on courts-martial (30-99, 206, 1355, 1930). (40-361 [2]).

## V. NATIONAL GUARD OFFICERS

9. National Guard officers attending service schools are not "in the military service of the United States" and consequently not eligible for detail on courts-martial convened by Federal authority

(30-1355, 1744) (40-361 [1]). When in active Federal service they are, of course, eligible.

## VI. PERSONS DISQUALIFIED

### *Accuser*

10. The person who signs the charges is *prima facie* the accuser and unless he is proved not to be the accuser is not eligible to sit on the court. If the accuser sits as a member of the court in the trial, the court is illegally constituted and the proceedings are void and no bar to a subsequent trial by a legally constituted court. The accuser should not even participate in proceedings on a plea to the jurisdiction under which his right to sit as a member of the court is questioned, and if he does, and then withdraws, subsequent findings and sentence will be illegal and void even though the accused afterwards pleads guilty (30-1345, 1350) (40-365 [7]). (43-137).

11. Mere *pro forma* action such as referring the charges for investigation and proper action does not disqualify the officer so acting from sitting as a member of the court, but it may constitute ground for challenge (12-155, 156; 30-1350) (40-395 [47]). See Article 18 (Challenge).

12. Where the first indorsement on the charge sheet showed that the charges were referred to a division general court-martial for trial "by order of Colonel M. C.," who sat as president of the court, and who had been temporarily in command of the division on the date on which the charges were so referred, it was held that the colonel was not ineligible under Article 8 to sit as a member of the court (43-182).

13. A commander may be an accuser within the meaning of this Article although the charges are signed by another. It is a question which, if raised, must be proved like any other issue. It calls in question the legal constitution of the court and may be raised at any stage of the proceedings, or taken to the reviewing or confirming authority (12-156). A commander who, despite the recommendation of an investigating officer that charges be not preferred, nevertheless directs that charges be preferred and brought to trial, is in fact the accuser (12-155).

14. When a member of the court was the accuser, and also testified as a witness for the prosecution, and the record fails to show that he was excused or withdrew from duty as a member of the court, the court was not legally constituted and the proceedings were null and void (42-12, 13).

*Witness for Prosecution*

15. If a member of the court becomes a witness for the prosecution and thereafter continues to sit as a member, the court is unlawful and its proceedings are void. When so called by the prosecution he becomes disqualified as a member of the court, whether his testimony is prejudicial to the accused or otherwise. The disqualification, being statutory, cannot be waived by the accused (30-1353) (40-365 [8]) (44-334, 335) (See M.C.M. 59).

16. When a member of the court gave testimony upon an unimportant collateral issue, but his evidence tended to impeach certain testimony of the accused it was held that the member had acted as a witness for the prosecution, and the proceedings were void (42-321, 322) (47-57, 58).

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*ARTICLE 5. GENERAL COURTS-MARTIAL—COMPOSITION. General courts-martial may consist of any number of members not less than five. (As amended by S.S.A. '48.)*

*ARTICLE 6. SPECIAL COURTS-MARTIAL—COMPOSITION. Special courts-martial may consist of any number of members not less than three. (As amended by S.S.A. '48.)*

*ARTICLE 7. SUMMARY COURTS-MARTIAL; COMPOSITION. A summary court-martial shall consist of one officer. (Should be a field officer if practicable. M.C.M. 4d.)*

**ANNOTATION**

1. The exercise of discretion in fixing the number of members to be detailed on general and special courts with reference to conditions of the service, is executive and not subject to judicial review (12-158).

2. A court may proceed in the absence of one or more of its members so long as it is not reduced below the prescribed minimum number, but not otherwise. A court of less than the prescribed minimum may adjourn from day to day; and if, when reduced to the minimum, one is challenged, those remaining may pass upon the challenge (12-158, 574) (48-127). The record must show that the requisite number was present (40-362). See article 18 (Challenge).

3. A court reduced to less than the prescribed minimum, and thereupon adjourning indefinitely, does not dissolve itself. It should report the facts to the convening authority and await his orders. He

may at any time complete it by adding new members and ordering it to reassemble for business (12-158).

4. Where, in a general court of only five members, one member is called as a witness for the defense, the validity of the proceedings will not be affected, for in so testifying he does not become disqualified as a member (12-524). But he cannot be called to testify for the prosecution. See Article 4.

5. Under the code of 1916 the number of members of a special court was prescribed as "three to five inclusive", and a special court of six members was held not legally constituted (30-1358); from which it is to be inferred that a summary court legally cannot consist of more than one officer.

## CHAPTER III

### COURTS-MARTIAL—BY WHOM APPOINTED

**ARTICLE 8. GENERAL COURTS-MARTIAL.** *The President of the United States, the commanding officer of a Territorial department, the Superintendent of the Military Academy, the commanding officer of an Army group, an Army, an Army corps, a division, a separate brigade, or corresponding unit of the Ground or Air Forces, or any command to which a member of the Judge Advocate General's Department is assigned as staff judge advocate, as prescribed in article 47, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and may in any case be appointed by superior authority when by the latter deemed desirable.*

*The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail: Provided, That no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. The law member, in addition to his duties as a member, shall perform the duties prescribed in article 31 hereof and such other duties as the President may by regulations prescribe. (As amended by S.S.A. '48 effective Feb. 1, 1949.) (See M.C.M. 5a.)*

### ANNOTATION

| I. IN GENERAL                        | Pars. |
|--------------------------------------|-------|
| AUTHORITY TO APPOINT NOT DELEGABLE . | 1-3   |
| THE CONVENING ORDER .....            | 4-6   |
| RELIEF OR ADDITION OF MEMBERS .....  | 7-9   |
| DISSOLUTION OF THE COURT .....       | 10-12 |

## THE ARTICLES OF WAR

|   |        |
|---|--------|
| II. BY SUPERIOR AUTHORITY .....             | 13-14  |
| III. BY TERRITORIAL COMMANDERS .....        | 15-15b |
| IV. BY TACTICAL COMMANDERS                  |        |
| ARMY OR ARMY CORPS .....                    | 16-17  |
| DIVISION .....                              | 18-19  |
| SEPARATE BRIGADE .....                      | 20-21  |
| V. BY COMMANDERS EMPOWERED BY THE PRESIDENT |        |
| DISTRICT COMMANDERS .....                   | 22     |
| CAMP COMMANDERS .....                       | 23-25  |
| OTHERS .....                                | 26     |
| VI. LAW MEMBER .....                        | 27-28  |

## I. IN GENERAL

*Authority to Appoint Not Delegable*

1. The authority to appoint a general court-martial is an attribute of command and cannot be delegated to a staff officer (12-494). In the absence of the officer exercising general court-martial jurisdiction, the authority is vested in the next senior in rank in the line of command. The same rule holds for the relief of members and filling vacancies. The personal presence of the commander in or with the command is not essential provided he is not on leave or engaged in other duty incompatible with the full and legal exercise of authority over the command (12-153, 154) (M.C.M. 5a).

1a. Where the authority of a commander to appoint a general court-martial is based upon the assignment of an officer of the Judge Advocate General's Corps to his command, such assignment must be "as staff judge advocate," as provided in Article 47 (M.C.M. 5a).

2. The jurisdiction passes with command, and where troops pass from one command to another command having general court-martial jurisdiction, such jurisdiction is also transferred, even though the transfer is only temporary, such as during a practice march or maneuvers (12-154; 30-1271) (40-365 [1] [2]).

3. Officers may be transferred by competent orders from one command to another for court-martial duty, and an accused may be so transferred for trial (30-1339, 1348) (40-361 [1], 365 [1]).

*The Convening Order*

(See M.C.M. App. 2)

4. If the convening order is illegal the proceedings of the court will be void (12-573). The order should be headed and authenticated to show that the convening authority has the necessary jurisdiction; it should be general in application, as "for the trial of such persons as may properly be brought before it," or clearly indicate the case

or class of cases it is to try (12-496). An officer was convicted of absence without leave under A.W. 61 and acquitted of making false official statements under Articles 95 and 96. The court was appointed by General "X", to whom the alleged false statements were made, and who was a witness for the prosecution. It was held that although General "X" did not sign the charges he was, in fact, the accuser or prosecutor, and his appointment of the court was in violation of this Article, notwithstanding accused was acquitted of the charges to which General "X" testified, and the further fact that, owing to a change in command, General "X" was not the reviewing officer on the case (45-273.) A plea to the jurisdiction of the court on the ground that the convening authority was the accuser must be disposed of before proceeding with the trial on the general issue, and when the defense was not permitted to introduce evidence in support of such plea until after the prosecution had rested it was held to be prejudicial error and the proceedings were disapproved (45-335, 336).

5. Failure to designate a date in the convening order for the court to meet, or to direct it to meet at the call of its president, will not affect the validity of its proceedings if the record shows that it met after the date of the order (30-1270). Dating the convening order on Sunday does not affect its validity (12-571) (40-395 [40]).

6. A convening order issued by superior authority (when the officer having immediate jurisdiction is the accuser) need not specify the particular case (30-1274) (40-365 [5]), but it would be the better practice to do so.

#### *Relief or Addition of Members*

(See M.C.M. 37)

7. The convening authority is empowered, at his discretion, to relieve a member from further duty on the court in a particular case, and unless this discretion is abused, the accused will not be prejudiced thereby (30-1357) (40-395 [46]).

8. The addition of members after any material part of the trial has been held, while legal, is not desirable and should be resorted to only in an exceptional case and to prevent failure of justice (12-507); but adding a member, or members after all the testimony has been taken, though strictly not illegal, has been held to constitute an irregularity prejudicial to the accused, especially when sufficient new members were added to, in effect, constitute a new court (30-1349) (40-395 [46]).

9. The relief from active duty of a retired officer, who, while in an active duty status, has been detailed as a member of a general court-martial automatically terminates such detail (30-Sup. 1340) (40-365 [9]. See Art. 4, Annotation par. 8.



## THE ARTICLES OF WAR

*Dissolution of Court*

10. An order dissolving the court is not necessary. It is the better practice not to issue such an order, then the court can be reconvened at any time, if necessary, without further orders (30-1278) (40-395 [38]).

11. If an order of dissolution is issued and notice of it communicated to the court, it cannot be revoked. A court so dissolved must be reconvened, if at all, as a new and distinct tribunal. An order of dissolution is not effective until official notice of it has been received by the court and proceedings had by the court after such order is issued, but before the court is officially advised of it, will be legal and valid (12-523).

12. When the members of the court are transferred out of the command for which the court was appointed their power to function on the court ceases (30-1338) (40-365 [1]). But a member may continue to sit on the court after his transfer to another command. There is no requirement that the members of a court-martial must be under the command of the appointing authority at the time of trial (46-64).

## II. BY SUPERIOR AUTHORITY

*("Department (or corps area)" applies with equal force to army areas and to the Military District of Washington.)*

13. The power of the President, or the Secretary of War acting for the President, to appoint general courts-martial has always been recognized (12-491).

14. The Secretary of War may order a department (or corps area) commander to convene a court for the trial of an officer belonging to a tactical division serving within the department (or corps area). Such an order will be sufficient to authorize the department (or corps area) commander to appoint officers of such division as members of the court, and also give him the necessary jurisdiction over the person to be tried (30-1339) (40-361).

## III. BY TERRITORIAL COMMANDERS

*(The words, "district" or "territorial division or department" includes the territorial command formerly designated as a "Corps Area" or "Service Command," and the present Army Area, as well as the Military District of Washington.)*

15. The military governor of a district has no authority as such to convene a general court-martial unless he is the commander of a force so authorized, in which case his convening order should show that fact (12-157).

15a. When two commands, each having general court-martial jurisdiction, occupy the same territory, their jurisdiction is concur-

rent, and, in the absence of an order or regulation to the contrary, the commanders may agree between themselves as to the jurisdiction which each shall exercise. While regulations (A.R. 170-10, Aug. 10, 1942) provide that all persons subject to military law stationed within a service command (formerly corps area) and not subject to any other general court-martial jurisdiction are under the jurisdiction of the service command, that does not prevent the service command from consenting to the exercise of general court-martial jurisdiction by other commands vested with such jurisdiction within the territory of the service command (42-357, 358).

15b. The commanding general of a service command may authorize the commanding general of a division stationed within the service command to detail officers of the service command as members and trial judge advocates of general courts-martial convened by the division commander (43-7).

#### IV. BY TACTICAL COMMANDERS

##### *Army or Army Corps*

16. The "Army of Cuban Pacification" (in 1908) was held to be "an army" within the meaning of this Article (12-154).

17. Under the old code, corps commanders were not authorized, as such, to convene general courts-martial, but it was held that a corps commander was the "commander of an army in the field" and in such capacity was authorized to convene such courts. Later, under the code of 1874 (Art. 72) it was held that the commander of a corps which was a constituent part of a larger body and not a separate and distinct army was not so authorized (12-153, 154). Under these old articles "any general officer commanding an army" had general court-martial jurisdiction, and no mention was made of corps commanders as such. Under the present article both army and army corps commanders are specifically given general court-martial jurisdiction, also "Army group" commanders.

##### *Division*

18. When units are taken away from a division until only one regiment is left, the division commander no longer has general court-martial jurisdiction, even though he formerly exercised such jurisdiction as commander of a separate brigade (12-157).

19. All persons subject to military law in a post or camp where a division is located, and not being members of another command having general court-martial jurisdiction, are administratively construed to be attached to the division for general court-martial purposes. Charges against all such persons may be referred by the division commander to general courts-martial appointed by him for trial (30-1272) (40-365 [2], 369).

*Separate Brigade*

20. A "separate brigade" is one which is not a part of a division, but is operating as a distinct command (12-156; 30-1271) (40-365 [3]). Mixed commands approximating a brigade may be designated, by proper authority, as separate brigades for purposes of general court-martial jurisdiction (12-156, 157). In 1901 the Provost Marshal of Manila P. I. was held to have general court-martial jurisdiction as the commander of a force equivalent to a separate brigade (12-157); but a "depot brigade" at a camp where other troops are stationed is not a separate brigade within the purview of this article (30-1271) (40-365 [3]).

21. A brigade which is not assigned to a division but which is a part of the corps troops of an Army corps is not a separate brigade within the meaning of this article authorizing commanders of separate brigades to appoint general courts-martial (42-102).

## V. BY COMMANDERS EMPOWERED BY THE PRESIDENT

*District Commanders*

22. The provision "when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial" is construed to limit the jurisdiction of courts appointed by officers so empowered to their own respective commands (30-1273) (40-365 [4]). The grant of authority to appoint courts-martial is made to a "position" or "command" and is not personal to any particular individual (48-71).

*Camp Commanders*

23. A "camp commander," as such (having no staff judge advocate, see Article 47), whatever may be his rank or command, has no authority to appoint a general court-martial unless so empowered by the President under the provision referred to in paragraph 22 above. A division commander, in that capacity, may exercise jurisdiction over all persons subject to military law serving in the camp, but general courts appointed by him as "camp commander" are illegal and they cannot be validated by orders purporting to amend or correct the original (30-1272) (40-365 [2]).

24. During the First World War certain camp commanders were given general court-martial jurisdiction when the division commanders and their headquarters had been moved from such camps, but such camp commanders had no authority to review proceedings of courts appointed by division commanders (30-1272) (40-365 [2]). Later (by G. O. 56, W. D. 1918) camp and division commanders in the same camp were given concurrent court-martial jurisdiction, and it was held that, while the division commander had jurisdiction with-

in his command, cases arising in the division might be turned over to the camp commander in order to facilitate the review of proceedings and final action thereon. This quite often resulted in the division commander transferring cases to himself as camp commander in order that, when the division was moved from the camp, his successor in command of the camp might have necessary jurisdiction to complete pending cases (30-1339) (40-365 [2]).

25. A camp commander whose general court-martial jurisdiction has been revoked, except for pending cases, is authorized to take the action required to complete cases undisposed of when the revocation order went into effect, including the detail of additional members of a court reduced below the minimum required membership. (30-1349) (40-365 [4]).

### *Others*

26. An officer temporarily exercising a command having general court-martial jurisdiction, and also in direct command of a unit included in the larger command which does not have such jurisdiction (e.g. a brigade commander temporarily in command of the division to which his brigade belongs) cannot convene a general court-martial in his capacity as brigade commander. The proceedings of a court so convened would be void (30-1275).

## VI. LAW MEMBER

27. The failure to appoint a law member qualified as provided in the Article will render the proceedings of the court void. His qualifications should be expressly stated in the convening order (M.C.M. 4e, App. 2 for form of such statement). The senior member may be designated if he is qualified as prescribed in the Article (40-365-9; 42-13; 43-137).

28. Under this Article, as now amended, the law member must be an officer of the Judge Advocate General's Department or an officer who is a member of the bar certified by the Judge Advocate General to be qualified for such detail; and the law member must be present when evidence is received or the court votes upon its findings or sentence. See Article 31 for specific duties and authority of the law member.

\* \* \* \*

*ARTICLE 9. SPECIAL COURTS-MARTIAL. The commanding officer of a district, garrison, fort, camp, station, or other place where troops are on duty, and the commanding officer of an Army group, an Army, an Army corps, a division, brigade, regiment, detached battalion, or corresponding unit of Ground or Air Forces, and the commanding officer of any other detached command or group of detached units*

placed under a single commander for this purpose may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable. (As amended by S.S.A. '48, effective Feb. 1, '49) (See M.C.M. 5b).

**ARTICLE 10. SUMMARY COURTS-MARTIAL.** *The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: Provided, That when but one officer is present with a command, he shall be the summary court-martial of that command and shall hear and determine cases brought before him.* (See M.C.M. 5c).

### ANNOTATION

|                                      |       |
|--------------------------------------|-------|
| I. IN GENERAL                        | Pars. |
| BASED UPON COMMAND .....             | 1-3   |
| COMMANDER MAY NOT APPOINT HIMSELF .. | 4     |
| II. DETACHED COMMANDS .....          | 5-7a  |
| III. RETIRED OFFICERS .....          | 8     |

### I. IN GENERAL

#### *Based Upon Command*

1. The rank of the appointing officer is immaterial provided he has the required command (12-159).

2. The authority to appoint inferior courts-martial, as in general courts, is based upon command expressed coordinately (1) as to territory and (2) as to size or constitution of the command. The authority of neither is exclusive of the other (30-1277) (40-367 [1]). In practice, however, if a post commander exercises the power (being the superior) he does so to the exclusion of all others under his command, but if he does not, he allows the appointing power, including the power of review, to pass to regimental (or other) commanders by operation of law (12-580).

2a. "Squadrons," "Groups" and "Wings" in the Air Forces bear a tactical and administrative correlation to battalions, regiments, and brigades in the Ground Forces. Accordingly comparable inferior court-martial jurisdiction may be exercised by the commanders of such Air Force units (43-304). See Air Force Military Justice Act,

1948, cited under "Enactment of the Articles of War" at the beginning of this book.

3. The general term "other place" includes every situation or locality in which there may be, however temporarily, a separate command or detachment (12-159). It includes any and all places, whether camp, post, station, hospital, or transport (44-183).

#### *Commander May Not Appoint Himself*

4. A commander is not authorized to detail himself as a member of a special court (12-159); in accordance with this principle a commander should not act as summary court for his command (unless so designated by higher authority) except when he is the only officer present with the command as provided by Article 10. The commanding officer of a branch recruiting office operating under a central office is not the only officer present with the command within the proviso of Article 10 so as to authorize him to function as a summary court without competent orders detailing him as such (30-1277) (40-367 [2]). But the fact that the summary court officer or his appointing authority is the accuser in a particular case, does not invalidate a summary court trial (M.C.M. 5c).

## II. DETACHED COMMANDS

5. A "detached battalion" is one which is isolated or removed from immediate disciplinary control of the commander of the regiment to which it belongs. A "detached command" or "detachment" is any body of troops which is separated from other troops in such manner as to make its commander primarily responsible for its disciplinary administration (30-1277) (40-367 [1]). (44-183). The Army officer in command of Army personnel assigned to a naval vessel may impose punishment under Article 104 (Disciplinary Powers of Commanding Officers) and may appoint special and summary courts-martial for the trial of such personnel. An "evacuation hospital, semi-mobile," when not attached to a medical battalion or higher echelon for administrative purposes, is a detached command within the meaning of Articles 9 and 10 (44-226). A senior escort officer commanding a replacement shipment may exercise inferior court-martial jurisdiction over the personnel of his command while on an Army transport or in a staging area unless the transport commander, or staging area commander, reserves the power to himself (45-173).

6. When an organization or detachment of a staff corps or department is so situated as to constitute an independent command, the commander has the authority conferred by these Articles (12-159, 579, 580). The commander of special troops belonging to a division has authority, subject to the power of the division commander to appoint if he desires (30-1277) (40-367 [1]).

6a. Divisional artillery battalions of an airborne division are "detached battalions" within the meaning of Articles 9 and 10, and commanders of such battalions are authorized to appoint inferior courts-martial (43-183).

7. The personnel of a staff corps or department serving at a post, and removed from the disciplinary control of a superior of their own branch of the service, are under the disciplinary jurisdiction of the post commander, and individual soldiers attached to a command are subject to trial by courts-martial in the command to which they are attached (30-1276, 1277) (40-367 [1]). In general, court-martial jurisdiction follows the lines of command rather than the lines of the various branches of the service.

7a. A division commander is authorized to appoint inferior courts for all organizations and detachments of his command. It follows that he may attach units of his command to other units of the command for inferior court jurisdiction. Officers of a unit so attached to another may be detailed as members of the courts appointed by the officer thus exercising the inferior court jurisdiction (42-322).

### III. RETIRED OFFICERS

8. In time of peace a retired officer on active duty in a purely staff capacity is not eligible to be appointed summary court (30-1356) (40-367 [1]), but one on active duty in recruiting may be so appointed (30-1356) (40-221). In time of war the President is authorized to employ retired officers on active duty at his discretion and officers so employed are eligible for court-martial duty (30-1356) (40-211). It appears probable that retired officers ordered to active duty under the emergency powers granted the President, would be considered eligible for court-martial duty.

. . . .

*ARTICLE 11. APPOINTMENT OF TRIAL JUDGE ADVOCATES AND COUNSEL. For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: Provided, That the trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Department or officers who are members of the bar of a Federal court or of the highest court of a State of the United States: Provided further, That in all cases in which the officer appointed as trial judge advocate shall be a member of the Judge Advocate General's Department, or an officer who is a member of the bar of*

*a Federal court or of the highest court of a State, the officer appointed as defense counsel shall likewise be a member of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States: Provided further, That when the accused is represented by counsel of his own selection and does not desire the presence of the regularly appointed defense counsel or assistant defense counsel, the latter may be excused by the president of the court: Provided further, That no person who has acted as member, trial judge advocate, assistant trial judge advocate or investigating officer in any case shall subsequently act in the same case as defense counsel or assistant defense counsel unless expressly requested by the accused: Provided further, That no person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act in the same case as a member of the prosecution: Provided further, That no person who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate to the reviewing or confirming authority upon the same case. (As amended by S.S.A. '48, effective Feb. 1, 1949.) (See M.C.M. 6.)*

## ANNOTATION

|                                     | Pars. |
|-------------------------------------|-------|
| I. TRIAL JUDGE ADVOCATE             |       |
| ONLY THE CONVENING AUTHORITY        |       |
| CAN APPOINT .....                   | 1-2   |
| SAME OFFICER MAY BE APPOINTED FOR   |       |
| SEVERAL COURTS .....                | 3-3a  |
| RELIEF OF TRIAL JUDGE ADVOCATE .... | 4-7   |
| II. DEFENSE COUNSEL .....           | 8-13  |

(See Article 17 for Duties of Trial Judge Advocate and Defense Counsel.)

## I. TRIAL JUDGE ADVOCATE

### *Only Convening Authority Can Appoint*

1. It is only the convening authority who can detail or relieve a trial judge advocate. The court has no such authority and when a court assumed the power to appoint one of its members to act as judge advocate in lieu of the one appointed by the convening authority, the proceedings were disapproved (12-509, 561, 572; 30-1415). It is a jurisdictional matter and not merely procedural (30-1415, Sup. 1415) (40-368 [1]). Activity in a trial on behalf of the prose-



cution by a volunteer assistant who has no color of official appointment constitutes fatal jurisdictional error. (47-58.)

2. The trial judge advocate must be designated by name. A direction in the convening order that in the absence of the trial judge advocate the junior member of the court will act in his stead is improper (12-561).

*Same Officer May Be Appointed for Several Courts*

3. An officer may be trial judge advocate of several courts at the same time, but he should be named as such in each convening order and detailed anew for every court upon which he acts. To appoint him, by general order, as trial judge advocate of all (or several) courts is improper (12-496).

3a. Determination as to the availability of members of the Judge Advocate General's Corps, or of Federal or State bars, for appointment as trial judge advocate and defense counsel rests with the appointing authority, and his determination is final (M.C.M. 41a); but when the trial judge advocate is a member of the Judge Advocate General's Corps, or of a Federal or State bar, the defense counsel must be similarly qualified. However, the Article does not provide that the respective qualifications must be identical. The trial judge advocate may be a member of the Judge Advocate General's Corps and the defense counsel may be a member of the bar, duly certified, or *vice versa*; the purpose being to insure that the accused shall have the right, subject to express waiver, to be represented in a general or special court-martial trial by a legally qualified lawyer when the prosecution is conducted by a lawyer so qualified. (M.C.M. 43a). The convening order should show the qualifications of both the trial judge advocate and defense counsel (M.C.M. 6, and App. 2 for form). The term "members of the Judge Advocate General's Corps," as used in this Article, includes all officers commissioned in such Corps and officers of any component of the Army of the United States on active Federal duty and assigned to such Corps (M.C.M. 6).

*Relief of Trial Judge Advocate*

4. A trial judge advocate may be relieved by the convening authority pending a trial and a new one appointed, but it is improper to make such change after the trial is completed simply for the purpose of authenticating the record (12-494). See Article 33 for manner of authenticating the record when the trial judge advocate is not available.

5. A trial judge advocate may be detailed to other duty, such as officer of the day, member of a board, and the like, provided it does not interfere with his duties as trial judge advocate; but, in general,

no other duties should be imposed upon him pending an important trial (12-500).

6. The court may, in a proper case, excuse the trial judge advocate from attendance during a trial (30-1414; Sec M.C.M. 41 a), but no one except an assistant trial judge advocate, properly appointed, can assume his duties. His absence from proceedings in revision will not invalidate the proceedings. The record may be authenticated by a member as provided in Article 33 (30-1414) (40-395 [54]). But parity as to number and qualifications of prosecution and defense personnel should be maintained in case of changes during trial (M.C.M. 6, 43).

7. The trial judge advocate is not subject to challenge (30-1416) (40-375 [1]). See Article 18 (Challenge).

## II. DEFENSE COUNSEL

8. There is no authority for employment by the government of civilian counsel for the accused (12-506).

9. A retired officer may be ordered to active duty by the Secretary of War to serve as a defense counsel (30-207) (40-211) in the absence of statutory restriction limiting the number of, or purpose for which, retired officers may be ordered to active duty. A retired officer (when not detailed for the purpose) may act as counsel for the defense and receive such compensation as may be agreed upon by his client and himself (12-995).

10. It is within the discretion of the convening authority to refuse to detail a certain officer, upon request of accused, as defense counsel, upon the ground that such officer cannot be spared from his regular duties without material prejudice to the public interest (12-570).

11. When soldiers are being held by the civil authorities awaiting action of the grand jury, and they are without counsel, there is no objection to a judge advocate taking reasonable and proper steps in their behalf, including appearance for them at the trial. Whether such action is advisable is primarily for the decision of the local commander (42-99).

12. The officer who investigated the charges upon which accused is on trial should not be permitted to serve as defense counsel without a recorded explanation to the accused showing his appreciation of the full significance of such action (46-273, 274). An officer who investigated the charges and recommended trial cannot act as defense counsel at the trial unless the accused particularly desires and seeks his services in preference to, or along with, other counsel (46-332; 47-58, 59). An accused has the right to request, either personally or through counsel, that the accuser, investigating officer, or any other person who has indicated a belief in accused's

guilt, be permitted to act as his individual defense counsel, or that the regularly appointed counsel remain to defend him in any capacity, whatever may be such counsel's expressed views as to accused's guilt. However, actual misfeasance of defense counsel, appointed or individual, occurring during the trial will always constitute grounds for a reversal (47-119, 120, 170). An investigating officer is competent to act as defense counsel or assistant defense counsel *only when expressly so requested by the accused*. The fact that accused merely states that he "has no objection" is not the equivalent to a specific request (49-4).

13. The requirement for the appointment of defense counsel is mandatory, and failure of the appointing authority to appoint counsel deprives the court of power to try the case, notwithstanding the accused is represented by his individual counsel at the trial (46-332). See also, par. 3a, this Annotation.

## CHAPTER IV

### COURTS-MARTIAL—JURISDICTION

*ARTICLE 12. GENERAL COURTS-MARTIAL. General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: Provided, That general courts-martial shall have power to adjudge any punishment authorized by law or the custom of the service including a bad-conduct discharge. (As amended by S.S.A. '48, effective Feb. 1, 1949. The provision for a "bad-conduct discharge" is new.) (See M.C.M. 12, 13.)*

#### ANNOTATION

|  | Pars. |
|--|-------|
| I. IN GENERAL .....                              | 1-5   |
| II. WHO DETERMINES QUESTION OF JURISDICTION      | 6-7   |
| III. REQUIREMENTS NECESSARY TO VEST JURISDICTION |       |
| CASE MUST BE REFERRED TO THE COURT FOR           |       |
| TRIAL BY PROPER AUTHORITY .....                  | 8-11  |
| ACCUSED MUST BE ARRAIGNED .....                  | 12-13 |
| IV. COURT CANNOT STRIKE OUT CHARGES NOR          |       |
| ORDER A NOLLE PROSEQUI .....                     | 14    |

#### I. IN GENERAL

1. The jurisdiction of courts-martial is criminal in character. They cannot adjudge damages for private wrongs, rescind contracts, or pass upon other civil rights. Their sole function is to award punishments for violations of the Articles of War (12-510). A court-martial fine imposed for embezzlement (which, although a crime of a civil nature, is also an offense punishable under the 93d or 94th Articles of War) does not liquidate the civil liability involved (12-869; 30-615) (M.C.M. 7).

1a. A court-martial has no authority to sentence an officer to

reduction from a higher to a lower commissioned grade, whether temporary or otherwise (43-425). See Article 14 (Summary Courts-Martial Jurisdiction) Annotation, par. 8 as to reduction of enlisted men. The crime of treason as denounced by Article III, Section 3, Clause 1 of the Constitution is, as such, not triable by an Army court-martial. However, certain crimes which are specifically denounced by the Articles of War (e. g. Articles 75 and 81), treasonable in nature and in effect constituting treason, are so triable (44-49).

2. The jurisdiction of courts-martial is non-territorial (12-511). An accused may be transferred from one jurisdiction to another for trial (30-1338, 1339, 1348). A soldier absent without leave or in desertion is subject to the general court-martial jurisdiction of the command in which he is returned to military control (30-1338) or he may be returned to his original command for trial. However, if the personnel of the court is transferred away from the command for which the court was appointed its power to function ceases (30-1338) (40-365 [1].) (40-369 [1]). But when the command in which the court was appointed is dissolved and its personnel merged in another command, no reference being made to the court in the orders effecting the merger, the jurisdiction of the court continues for the trial of a case which had been referred to it before the merger. In such case the new commander, although not himself vested with general court-martial jurisdiction, is the proper reviewing officer (45-49). See Art. 47, Anno., par. 7.

2a. The jurisdiction of a court-martial, when regularly convened, is not limited to persons under the command of the convening authority. On the contrary, it has no limitation except that the person to be tried shall be a person subject to military law (44-377).

3. Since the origin and authority of courts-martial are statutory, the statutes relating thereto must be closely followed, and no presumption can be made in favor of their jurisdiction (12-511).

4. Courts-martial are no part of the civil judiciary system of the United States but are instrumentalities of the executive power. They are creatures of orders. The power to convene them is an attribute of command. But though transient and summary, their judgments upon subjects within their limited jurisdiction are as legal and valid as those of any other tribunals, and are not subject to be appealed from, set aside, nor to be reviewed by the civil courts of the United States or of any state (12-576, 577) (M.L.U.S. 360, note) (M.C.M. Chap. IV).

4a. Members of the armed forces of the United States serving in a friendly foreign country are subject to the jurisdiction of their own courts-martial. A statute of the foreign country purporting to confer jurisdiction on United States courts-martial in matters concerning discipline and internal administration, and to subject per-

sonnel of our forces to trial by its courts, does not deprive our courts-martial from exercising full criminal jurisdiction over the members of our forces (42-13) (M.C.M. 11).

5. Unless specifically so authorized by statute, a court-martial has no jurisdiction over an offense committed prior to the entry of the accused into the military service (30-1437) (40-369 [2]) (44-277). See Article 2, Annotation, par. 1. But a civilian internee who commits an assault upon an officer of the U. S. Army is triable by general court-martial (43-55). See Article 2 (Persons Subject to Military Law) Annotation, par. 29. Prisoners of war may be tried by courts-martial for offenses committed by them after the effective date of their surrender but prior to the time when they were taken into allied custody (46-263).

## II. WHO DETERMINES THE QUESTION OF JURISDICTION

6. A plea to the jurisdiction is addressed to the court and is for determination by the court, subject to review and correction, if erroneous, by the reviewing or confirming authority (30-1257; 40-395 [50]. See also M.C.M. 64).

6a. The defense of "entrapment" does not affect the jurisdiction of a court-martial, and its decision thereon may not be questioned in a civil court in a collateral proceeding (43-133). As to "entrapment" see Article 37 (Irregularities) Annotation, par. 2a.

7. A court-martial may decline to proceed with a case manifestly not within its jurisdiction: but it cannot refuse to proceed on the ground that it cannot adequately punish the offender, if convicted, or that an officer junior to the accused is a member, or that a larger court could have been detailed without injury to the service. Such matters rest in the discretion of the convening authority (12-494).

## III. REQUIREMENTS NECESSARY TO VEST JURISDICTION

*Case must be referred to the court for trial by proper authority.*

8. The general requirements in order to vest a court-martial with jurisdiction to try a given case are: (1) The court must be legally constituted; (2) the court thus constituted must be invested by law with power to try the person and the offense charged (M.C.M. 7).

9. If charges are referred to a court which is dissolved, or ceases to function for any reason, before reaching the case, it cannot be tried by another court without being referred to the second court by the convening authority (30-1318) (40-395 [32]). This is often done by inserting a clause in the convening order for the second court to

the effect that all cases referred to the first court, but not yet tried, are referred for trial to the second court. If a case is tried by a court to which it was not referred, the reviewing authority may ratify the court's action and act upon the sentence (44-54).

10. A mere change, by War Department order, in the designation of a command (e.g., "Department" to "Corps Area") will not divest a general court, appointed before such change, of its jurisdiction (30-1318).

11. If, on account of previous convictions, a dishonorable or bad conduct discharge is authorized, the case may be referred respectively to a general or special court-martial for trial notwithstanding the authorized punishment for the specific offense is within the jurisdiction of an inferior court (12-494, 495) (M.C.M. 117c Sec. B).

#### *Accused Must Be Arraigned*

12. In order to vest jurisdiction in the particular court to proceed with the trial of a given case, the accused must appear in person before the court and be arraigned (30-1368) (40-395 [32]). If, after arraignment, the accused escapes, the trial may proceed to finding and sentence notwithstanding his absence (30-1246) (40-395 [31]). The purpose of the arraignment is to apprise the accused, in open court, of the offense of which he is charged and the name of his accuser, and give him an opportunity to plead thereto. When this is done the arraignment is complete although no pleas are entered at the time. The pleas are not part of the arraignment (M.C.M. 52c, 62) (49-60-61).

13. The court has no authority to compel the accused to present himself for trial. Such is the province of the convening authority or other proper commander (12-509).

#### IV. COURT CANNOT STRIKE OUT CHARGES NOR ORDER A NOLLE PROSEQUI

14. The court, of its own motion, unless so authorized by the convening officer, cannot strike out a charge or specification, or order a *nolle prosequi*. However, when by motion or objection, the accused questions the sufficiency of the charges or specifications, the court is empowered, without reference to the convening authority, to allow the motion and to quash or strike out the charge or specification (12-509). This has no reference to the power of the court, in a proper case, to make exceptions and substitutions in its findings (M.C.M. 64f).

\* \* \* \*

*ARTICLE 13. SPECIAL COURTS-MARTIAL. Special courts-martial shall have power to try any person subject to military law for any*

*crime or offense not capital made punishable by these articles: Provided, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interests of the service so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses herein prescribed.*

*Special courts-martial shall not have power to adjudge dishonorable discharge or dismissal, or confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months: Provided, That subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by The Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad-conduct discharge in addition to other authorized punishment: Provided further, That a bad-conduct discharge shall not be adjudged by a special court-martial unless a complete record of the proceedings of and testimony taken by the court is taken in the case. (As amended by S. S. A. '48 effective Feb. 1, 1949.) (See M.C.M. 14, 15, 82a, 116).*

**ARTICLE 14. SUMMARY COURTS-MARTIAL.** *Summary courts-martial shall have power to try any person subject to military law, except an officer, a warrant officer, or a cadet, for any crime or offense not capital made punishable by these articles: Provided, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a special court-martial: Provided further, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.*

*Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay. (As amended by S. S. A. '48 effective Feb. 1, 1949.) (See M.C.M. 16, 17, 82b, 116).*

### ANNOTATION

|                            | Pars. |
|----------------------------|-------|
| I. AS TO PERSONS .....     | 1-2b  |
| II. AS TO OFFENSES .....   | 3-5   |
| III. AS TO SENTENCES ..... | 6-13  |

#### 1. AS TO PERSONS

1. The term "cadet" as used in Article 14 refers only to cadets at the United States Military Academy (30-595) (40-359 [7]).



2. Persons of actual, relative or assimilated rank above the third enlisted grade are excepted from summary court-martial jurisdiction. Noncommissioned officers of the first two grades may be tried by summary courts if they consent thereto in writing. Other noncommissioned officers may be tried by summary court, either if they do not object, or having objected, such trial is ordered by the officer competent to bring them to trial by special court (M.C.M. 16).

2a. Prisoners of war are subject to trial by special as well as general courts-martial upon the same terms as members of our forces (44-331).

2b. When a corporal, tried by a summary court, was not informed of his right to object to trial by that court, and the proceedings were vacated, it was held not to constitute a bar to a subsequent trial for the same offense by a special court (45-3, 4).

## II. AS TO OFFENSES

3. Inferior courts have jurisdiction of any offense not capital, but in view of the limitations upon their punishing power, serious offenses should be referred to general courts. An inferior court cannot, however, refuse to take jurisdiction on the ground that it is not empowered to impose adequate punishment (12-160). See Article 12, Annotation par. 7. The trial, conviction and sentence of an accused by summary court-martial for an offense not capital, when duly ordered and approved by the appointing authority, is valid, and cannot thereafter be declared null and void by the appointing authority because he had been directed by higher authority not to refer such cases (e.g. statutory rape under Article 96) to an inferior court. No other jurisdictional question being involved, such trial is a bar to a subsequent trial by a general court-martial for the same offense (45-49).

4. Unless so directed by an officer having general court-martial jurisdiction, inferior courts cannot take jurisdiction of an offense for which the death penalty is authorized (see Art. 25); and no crime, or offense, capital or otherwise for which a mandatory punishment is prescribed can be tried by a special court-martial if such mandatory punishment is beyond the power of a special court-martial to adjudge (M.C.M. 14).

5. In case of conviction of several offenses, some of which are beyond, and some within, the court's jurisdiction, the proceedings are valid as to those within, and void as to those not within, the jurisdiction, and if the sentence imposed by the court included punishment for the offenses not within the jurisdiction, appropriate mitigation should be made by the reviewing authority (30-1319, 1320) (40-371 [1]).

## III. AS TO SENTENCES

6. The limitations upon punishments apply to single sentences. For distinct offenses, the subject of separate trials, resulting in separate sentences, several penalties, which together exceed the limit fixed for a single sentence, may be imposed (12-160).

7. A sentence forfeiting pecuniary allowances in addition to pay so that the whole amount exceeds the limit imposed, is not authorized (12-160). Under paragraph 117 *b* M.C.M. a court may not, in a single sentence which does not include a dishonorable or bad conduct discharge, adjudge the forfeiture of allowances as distinguished from pay (30-Sup. 1388) (40-402 [8]).

8. The limitations on sentences of imprisonment and fine do not preclude the imposition of other punishments sanctioned by the customs of the service, such as reduction in grade, either alone or in conjunction with those expressly mentioned (12-160). A court-martial has no power to reduce a noncommissioned officer to a lower noncommissioned grade (*i.e.*, sergeant to corporal) as this would involve an appointment to the lower grade, which a court-martial has no power to make (30-1389), (47-212); and for the same reason a court-martial cannot reduce a noncommissioned officer to private first-class (30-1389) (40-402 [11]). The accepted sentence in such cases is reduction to the grade of private. (Sec. M.C.M. 117c, Sec. B).

9. In case of a soldier above the lowest grade, if convicted, the court may adjudge reduction to the lowest grade in addition to other punishments (M.C.M. 117c). A sentence which includes a dishonorable, or bad conduct, discharge, whether suspended or not, or hard labor, with or without confinement, automatically reduces an enlisted person of other than the lowest grade to the lowest grade (M.C.M. 116d).

10. A sentence reducing a noncommissioned officer to the grade of private is effective although there are no privates in the detachment to which accused belongs, as long as there is a grade of private in his branch of service (30-1389) (40-402 [11]).

11. The limitation as to forfeitures extends to both amount and period. A summary court cannot impose a forfeiture to extend over a period of more than one month, nor a special court over a period of more than six months. To illustrate: a sentence by a summary court to forfeit \$5 per month for two months is legal only to the extent of \$5 forfeiture for one month; and a sentence of a lump sum forfeiture (not expressed in dollars per month) greater than two-thirds of the accused's pay per month, is legal only to the extent of the forfeiture of two-thirds of his pay for one month (30-1392, Sup. 1388) (40-371 [2]). These limitations are applicable to civilians, when tried by such courts, as well as soldiers (45-7).

12. A summary court may lawfully sentence a soldier to only one or the other of the two forms of deprivation of liberty in maximum amount in one sentence. If it is desired to adjudge both forms of punishment in the same sentence, there must be an apportionment. For example, it would be legal to adjudge confinement at hard labor for 15 days and restriction to limits for 45 days (30-1391) (40-371 [2]). (M.C.M. 17).

13. In applying the table of authorized substitutes to the table of maximum punishments (Par. 117c, M.C.M.) a summary court-martial is limited to a maximum of 30 days' confinement and 20 days' forfeiture of pay as the basis upon which to compute the substitutions. A summary court may, therefore, impose a sentence of 1½ days' hard labor without confinement for each of the 30 days' confinement, and for each of the 20 days' forfeiture authorized, or a total of 75 days' hard labor without confinement (30-Sup. 1401a) (40-371 [2]). (M.C.M. 17).

\* \* \* \*

*ARTICLE 15. JURISDICTION NOT EXCLUSIVE. The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.*

## ANNOTATION

|     |                         |       |
|-----|-------------------------|-------|
| I.  | MILITARY COMMISSIONS    | Pars. |
|     | NATURE AND ORIGIN ..... | 1-2   |
|     | JURISDICTION .....      | 3-7a  |
|     | PROCEDURE .....         | 8     |
|     | SENTENCES .....         | 9     |
| II. | PROVOST COURTS .....    | 10    |

### I. MILITARY COMMISSIONS

#### *Nature and Origin*

1. A military commission is a criminal war court. Its authority is derived from the laws of war, though in some cases their jurisdiction has been increased by statute (See Arts. 80, 81 and 82) (12-1066).

2. Military commissions were first established in our service in 1847. Their competency has been recognized by the executive, legislative, and judicial branches of our government. During the Civil War they were employed in several thousand cases; they were resorted to extensively under the "Reconstruction Act" of 1867 as substitutes for the state criminal courts, and in 1873 a military commission was

appointed for the trial of certain Modoc Indians for offenses "against the laws of war" (12-1066, 1067).

### *Jurisdiction*

3. Military commissions have no jurisdiction over civil actions. Except where they have been invested by statute with a jurisdiction concurrent with courts-martial (as in Arts. 80, 81 and 82) their authority cannot be extended to the trial of offenses which are specifically, or in general terms, made punishable by courts-martial by the Articles of War or other statutes (12-1069, 1070). A prisoner of war who, prior to being captured, commits acts in violation of the laws of war (e.g. torturing or murdering a prisoner) may be tried either by a military commission or a general court-martial (43-54).

3a. A theater commander, after cessation of hostilities but before a treaty of peace, has power to authorize trial by military commission of the Commanding General of the enemy forces upon a charge of failing to control the operations of his command by permitting them to commit widespread atrocities in violation of the laws of war; and the procedures of such military commission, when in keeping with the military orders defining its authority, are reviewable only by the military authorities and not by the civil courts (46-33, 34). This is the gist of the decisions of the U. S. Supreme Court rendered February 4, 1946, in the cases of Generals Yamashita and Homma who were tried by military commission in Japan late in 1945. See Art. 2, Annotation, par. 29.

4. The jurisdiction of military commissions extends to both civilians and military persons, either in the enemy's country under military government, or in our own country where martial law has been established. It covers two classes of offenses: (1) Violations of the laws of war; and (2) civil crimes which, because the civil authority is superseded by the military, and the civil courts are not functioning, cannot be tried by the ordinary tribunals. In other words, the military commission, besides exercising under the laws of war a jurisdiction over offenses peculiar to war, may act as a substitute, for the time, for the regular criminal courts of the state or district (12-1067); but a military commission cannot exercise jurisdiction over public offenses in a district where neither military government nor martial law is in effect and the regular criminal courts are in operation (12-1069). A military commission may, however, take cognizance of an offense committed before the establishment of the military control but not then brought to trial (12-1067).

4a. An enemy belligerent who secretly crosses through the lines for the purpose of waging war or committing sabotage, and discards his uniform, is guilty of a violation of the laws of war, and may be tried by military commission regardless of his citizenship and the

fact that the civil courts are open. The Fifth and Sixth amendments to the Constitution of the United States do not apply to such violations of the laws of war. (This is from the decision of the United States Supreme Court in the famous case of the Nazi saboteurs, October, 1942) (42-260). A prisoner of war may be tried by a military commission for violations of the laws of war committed by him while a combatant, and in such case depositions may be used by the prosecution unless otherwise provided by the convening authority. The provision of A.W. 25 authorizing the use of depositions in capital cases by the defense only does not apply in a trial by military commission (46-33).

5. Some of the principal offenses against the laws of war (committed mostly by civilians) which were passed upon and punished by military commissions during the Civil War were: Unauthorized trading, etc., with the enemy; blockade running; manufacturing arms, etc. for the enemy; dealing in contraband of war; seditious utterances or acts; violating a flag of truce, oath of allegiance, or parole by a prisoner of war; destruction of property used in military operations; recruiting for the enemy; assisting prisoners to escape or soldiers to desert; obstructing the draft or impeding enlistments; violations of military police regulations; conspiracy to violate the laws of war by destruction of life or property in aid of the enemy, etc. (12-1071).

6. The ordinary crimes taken cognizance of by these tribunals have run the entire gamut from homicides to ordinary breaches of the peace, including robbery, larceny, receiving stolen property, rape, arson, burglary, rioting, attempts to bribe public officers, and frauds against the government (12-1071).

7. Sometimes the crimes charged have been a combination of the two species of offenses above referred to, as in the case of the alleged killing of soldiers by shooting or unwarrantable harsh treatment after they had surrendered or become prisoners of war, of which offenses persons were in several cases in the Civil War convicted by military commissions under a charge of "murder in violation of the laws of war" (12-1071, 1072).

7a. By a Military Order, January 11, 1945, the President, by virtue of the authority vested in him as Commander-in-Chief of the armed forces, under the Constitution and laws of the United States, and particularly the 38th Article of War (President may Prescribe Rules) ordered:

(1) That enemy aliens who, in time of war, enter or attempt to enter the United States, or any territory or possession thereof, and are charged with committing, or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and the commanding generals of the several serv-

ice and defense commands in the continental United States and Alaska, under the supervision of the Secretary of War, are empowered to appoint military commissions for the trial of such persons.

(2) Each such military commission shall have power to make rules for the conduct of its proceedings, consistent with the powers of such commissions under the Articles of War: *Provided*, that (a) such evidence shall be admitted as would, in the opinion of the president of the commission, have probative value to a reasonable man; (b) The concurrence of two-thirds of the members of the commission present when the vote is taken shall be necessary for a conviction or sentence; (c) The provisions of Article of War 70 (now 46) relating to investigations and preliminary hearings shall not be applicable to the proceedings; and (d) The record of trial, including any judgment or sentence, shall be promptly reviewed under the procedure established in Article of War 50½ (now Article 50).

### *Procedure*

8. In the absence of statutory regulation (and there is practically none) military commissions are governed as to forms of procedure by the laws of war (12-1068). The rules which apply to general courts-martial have almost uniformly been applied. They have ordinarily been convened by officers exercising general martial jurisdiction; the complaints have been in the form of charges and specifications similar to those entertained by general courts; their proceedings have been similar and similarly recorded; and their sentences have been similarly passed and executed. Their composition has been the same except that the minimum of members has usually been three. They have had a judge advocate. The members should be sworn like those of a general court-martial, and the right of challenge should be afforded the accused. The statute of limitations applies to prosecutions before military commissions, and their proceedings should be passed upon by the convening authority, or his successor in command, as for general courts-martial (12-1070).

### *Sentences*

9. The latitude of a military commission as to sentences is not restricted or defined by statute except in the case of a spy (under Article 82) where the death penalty is mandatory. The sentence, however, should be in the nature of a criminal punishment and not of a civil judgment. In general a military commission should consider the local law, if any, prescribing the penalty for the offense involved (12-1072).

## II. PROVOST COURTS

10. Provost courts also derive their authority from the laws of war by which a military commander in a region under military occu-

pation and control, where the ordinary courts are not functioning, is authorized to appoint a special court or judge for the determination of cases not properly cognizable by the ordinary military tribunals. Such courts are commonly designated provost courts. They have no jurisdiction of purely military offenses. Their jurisdiction, unless specially limited by the appointing power, is both civil and criminal. During the Civil War they were usually resorted to as substitutes for the ordinary police courts (inferior civil courts), but some of them in the course of their existence took cognizance of important civil actions. Their jurisdiction over civil actions, when duly empowered by a competent military commander, has been recognized and affirmed by the Supreme Court of the United States (12-1064, 1065).

\* \* \* \*

**ARTICLE 16. PERSONS IN THE MILITARY SERVICE HOW TRIABLE.** *Officers shall be triable only by general and special courts-martial and in no case shall a person in the military service, when it can be avoided, be tried by persons inferior to him in rank. No enlisted person may sit as a member of a court-martial for the trial of another enlisted person who is assigned to the same company or corresponding military unit. No person subject to military law shall be confined with enemy prisoners or any other foreign nationals outside of the continental limits of the United States, nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him. (As amended by S.S.A. '48, effective Feb. 1, '49.) (M.C.M. 4, 58e.)*

#### ANNOTATION

1. The decision of the convening authority as to whether it is possible to constitute a court of members all superior in rank to the accused cannot be questioned by the court (12-493). In practice, officers junior in rank to the accused are not detailed as members of the court; but if, in the opinion of the convening authority, the detail of such junior officers cannot be avoided, and they are so detailed, and are not otherwise disqualified, the court is not thereby rendered illegal.

2. Under this Article there is no authority which warrants the forfeiture of pay and allowances due at the date of the order executing the sentence. The approved form of sentence of total forfeitures is: "To forfeit all pay and allowances to become due after the date of the order directing execution of the sentence" (M.C.M., App. 9, p. 364) (49-64).

## CHAPTER V

### COURTS-MARTIAL—PROCEDURE

*ARTICLE 17. TRIAL JUDGE ADVOCATE TO PROSECUTE; COUNSEL TO DEFEND. The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel. (See M.C.M. Chaps. IX and XIII.)*

#### ANNOTATION

|                               | <i>Pars.</i> |
|-------------------------------|--------------|
| I. TRIAL JUDGE ADVOCATE ..... | 1-8          |
| II. DEFENSE COUNCIL .....     | 9-18         |

#### I. TRIAL JUDGE ADVOCATE

(See M.C.M. 75b, 85)

1. The trial judge advocate is the routine medium of communication between the court and the convening authority. The convening authority often addresses the president of the court-martial direct, but even such communications are usually sent through the trial judge advocate. As noted under Article 11, the trial judge advocate is appointed by the convening authority, and the court is not empowered to relieve or displace him.

2. One of the functions of the trial judge advocate is to advise the members, and all parties concerned, of the time and place of meetings of the court. He does this by direction of the president. It is



also his duty to arrange for a suitable room for the use of the court and see that it is properly furnished and equipped. He also employs the reporter when one is authorized (12-500).

3. The general presumption of law that public officials duly perform their functions applies to the trial judge advocate (12-500).

4. The trial judge advocate cannot be placed in arrest or otherwise disciplined by the court or its president except through the convening authority (12-509).

5. The trial judge advocate has no authority to act upon charges until they are referred to him by the convening authority, and he should not presume to modify the charges in any material particular unless the convening authority so directs. He may correct obvious mistakes and slight errors in names, dates, amounts, etc. He cannot enter a *nolle prosequi* or withdraw charges unless by order of the convening authority (12-495, 496, 509). And when a *nolle prosequi* is entered by order of the convening authority, the proceedings do not bar a subsequent prosecution for the same offense (46-276, 277) (M.C.M. 73, 74).

6. The trial judge advocate may stipulate with the defense as to the facts to which a witness would testify if present (30-1289) (40-395 [28]). Such stipulation does not necessarily admit the truth of such testimony. (M.C.M. 140b).

7. Strictly speaking, the trial judge advocate is not required to give his opinions upon questions of law arising during the trial unless called upon by the court to do so. In practice, however, this rule is often departed from and his opinion, properly tendered, is received by the court without objection (12-498). If the court requests his opinion, the question presented and the advice given should appear in the record, but if not, it will not be presumed that the opinion given was erroneous, and the irregularity will not affect the validity of the trial (30-1367) (40-390 [1]).

8. It is the privilege of the trial judge advocate to make an opening and a closing argument, even though the defense counsel waives his right to present an argument. The court cannot deny him this right (12-501). The trial judge advocate, however, should not take the time of the court unnecessarily. The majority of cases require nothing more than an answer to the argument of the defense. Any improper argument by the trial judge advocate, either upon questions of law or fact, if prejudicial to the accused, will warrant a setting aside of the whole proceedings of the court (30-1417) (40-395 [55]). (M.C.M. 77).

## II. DEFENSE COUNSEL

(See M.C.M. 64, 75c, 81, 85)

9. The defense counsel is entitled to full opportunity to interview

the accused and his witnesses prior to the trial, even though the accused may be in close arrest or confinement; and it is the counsel's duty to use all reasonable and proper means to acquit the accused, that is, to invoke any defense which the law and facts will justify, without regard to his own personal opinion as to the accused's guilt or innocence (12-505). Where the record shows that the accused, at the beginning of the trial, stated that he desired to be defended by the regularly appointed defense counsel and assistant defense counsel, a challenge by the prosecution against either of the defense counsel should not be sustained. To do so would be a denial of the accused's right to be defended "by counsel of his own selection" specifically guaranteed him by this Article, and would deprive the court of the power to try the case (46-332). An accused is entitled, as of right, to request, either personally or by counsel, that the accuser, investigating officer, or other person who has indicated a belief in accused's guilt, be permitted to act as his individual counsel or that a regularly appointed counsel remain to defend him in any capacity even though such counsel has expressed views inconsistent with accused's innocence. But actual misfeasance of counsel, appointed or individual, occurring during the trial will always constitute ground for a reversal (47-119, 120).

10. Counsel must not make statements or admissions which tend to establish the truth of any material allegations to which accused has pleaded not guilty, especially in the absence of any proof of such allegations, unless it clearly appears that such statements or admissions are made with the full knowledge and consent of the accused; and if such statements are made without the full knowledge and consent of the accused, it is the duty of the court to disregard them (30-1288) (40-395 [5]). An oral confession made by accused to his company commander who was, at the time, assistant defense counsel of the court which subsequently tried the case, was held to be a "privileged communication between attorney and client" to which the officer should not be permitted to testify when put upon the stand as a witness for the prosecution. (48-131.)

11. All persons on trial are equal in the eyes of the law, and the fact that the accused is an officer of high rank does not entitle him to any special right or privilege in his defense (12-502).

12. During the trial the accused should be subjected to no restraint other than such as may be necessary to enforce his attendance and prevent disorder. He should not be put in irons except in an extreme case when considered a necessary safeguard against escape or violence. An adequate guard will usually suffice (12-502, 503). The fact that accused was shackled during the trial will not affect the legality of the proceedings (12-558).

13. The accused has the right to be present during all the ma-

terial proceedings of his trial, but he may waive that right, and if he absents himself, after his arraignment, the trial may proceed without him. In such case counsel may continue his presentation of the case as though accused were present (12-514).

14. In the absence of an affirmative showing to the contrary it will be presumed that counsel performed all the general duties of his office, including an explanation to accused of his right, in a proper case, to plead the statute of limitations (30-Sup. 1261) (40-396 [1]). But see Article 39, Annotation, par. 3. The presumption that the defense counsel performed his full duty disappears when facts of record show otherwise; and his failure to exercise reasonable diligence in safe-guarding accused's interests will render the trial invalid when it clearly appears that the substantial rights of the accused were prejudiced thereby (45-173, 174). (46-273, 274; 47-170). See paragraph 9 *supra*. Also Art. 11, Annotation par. 12.

14a. Whenever deemed necessary the court should cause to be explained to the accused any right which he appears not fully to understand (M.C.M. 49g).

15. Administrative determination by the War Department that military counsel requested by accused is not available for that duty, is conclusive. Civilian counsel cannot be provided at government expense (30-Sup. 1269) (40-374).\*

16. The right of an accused to civilian counsel is a privilege, and cannot be asserted to defeat the ends of military justice. A trial by court-martial need not be continued until civilian counsel residing in the United States is able to reach a command in a distant theater of operations where the accused is stationed and the court is sitting (44-183, 184). A seasonable and reasonable motion for a continuance for the purpose of securing special counsel must be granted. (45-273.) It is the duty of the regular defense counsel, immediately after charges are referred to the court, to advise the accused of his right to have counsel of his own choice; and if the accused desires special counsel the regular counsel should immediately notify the appointing authority, and take appropriate steps to secure the requested counsel, and render any other assistance desired by accused. He should also advise accused of his right to have enlisted men on the court (M.C.M. 43b).

17. A defense counsel, whether military or civilian, may submit a written brief, if he so desires, to the court, the reviewing authority, or the Board of Review (45-230).

18. In a case which had lasted four days and the record was 365 pages long and counsel requested one and one-half hours for his closing argument, the court's action restricting him to fifteen minutes

\* The decision of the convening authority as to the availability of requested special defense counsel, and the decision of his immediate superior upon appeal, will not be reviewed except upon a showing of abuse of discretion (48-178, 179).

was held to be a gross abuse of discretion constituting reversible error (46-274) (M.C.M. 77).

*ARTICLE 18. CHALLENGES. Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause. (See M.C.M. 58.)*

### ANNOTATION

|                                  | Pars. |
|----------------------------------|-------|
| I. IN GENERAL .....              | 1-5   |
| II. CHALLENGES FOR CAUSE .....   | 6-13  |
| III. PEREMPTORY CHALLENGES ..... | 14    |

#### I. IN GENERAL

1. It is the duty of the court to see that the accused is afforded his right of challenge (12-551) and the record must affirmatively show the fact (12-573). This rule applies also to a member who takes his seat and is sworn after the trial has begun (30-1344) (40-375 [1]).

2. If the accused is advised of his right to challenge, both for cause and peremptorily, and exercises a peremptory challenge and is not thereafter asked whether he objects to any other member, the omission will not invalidate the trial; but if, in answer to the question whether he objects to any other member, defense counsel replies affirmatively and the record fails to show that the opportunity thus claimed was granted, the error is fatal (30-1344) (40-375 [1]).

3. It is prejudicial error for a member who has expressed an opinion on the case, or one who has expressed an adverse opinion as to the character of accused, to sit on the court without disclosing the fact (30-1345) (40-375 [2], 395 [47]).\*

4. Local prejudice is not necessarily good ground for changing the location of the trial; the accused has ample protection in his right of challenge (30-1412; 40-395 [41]).

5. The trial judge advocate is not subject to challenge (30-1416) (40-375 [1]). The defense counsel is not subject to challenge by the

\* The challenger has the right to interrogate the challenged member, and where this right was refused the accused, and defense then withdrew the challenge for cause and used his peremptory challenge upon another member, and afterwards made the usual statement that he did not object "to remaining members" it was held not to constitute a waiver of his challenge for cause, and the record was held not legally sufficient (49-7).

prosecution; and when the record showed that the accused, at the opening of the case, stated that he desired to be defended by the regular defense counsel, and the prosecution challenged the assistant counsel, and the challenge was sustained by the court, the proceedings were declared void. (46-332.)

## II. CHALLENGES FOR CAUSE

6. The following are good grounds for challenge: That a member is the accuser or author of the charges or a witness for the prosecution (See also Article 4.) or has expressed an opinion, based upon a knowledge of the facts, that the accused is guilty; or has officially investigated the case; or is prejudiced against the accused (12-163; 30-1345) (40-375 [2]). Personal knowledge of material facts of the case does not necessarily disqualify a member (12-163) but he should disclose the situation so that he may be challenged if desired. The court as a whole is not subject to challenge, but all the members may be challenged separately (12-163). When the record showed that a member of the court was openly and frankly biased as to the veracity of an important witness for the defense, and was challenged for cause by the defense but such challenge was not sustained, it was held that the challenged member was clearly incompetent to sit on the court and that failure to sustain the challenge injuriously affected the substantial rights of the accused. It was further held that a statement by defense counsel, after the defense had used its peremptory challenge upon another member who had previously been unsuccessfully challenged for cause, that "the accused has no objection to being tried by any member of the court now present" did not constitute a waiver of his objection to the challenged member who remained on the court. (48-21.)

6a. The law member may be challenged for cause like any other member. When the law member was the Acting Staff Judge Advocate of the command in which the accused was tried, and in such capacity had examined the charges, the investigating officer's report, and also confessions made by the accused, also he had discussed the case with the trial judge advocate, who was then his assistant, prior to the trial, and when challenged for cause he averred under oath that he had formed no positive opinion and had expressed no opinion as to the guilt or innocence of accused, and the court refused to sustain the challenge it was held: That the law member should have been excused, and the proceedings were disapproved. Under the circumstances the law member could not help but be prejudiced, and there was substantial doubt as to the impartiality of the trial (44-417, 418). The same conclusion was reached in a similar case in which the defense, evidently relying upon the law member's denial of prejudice, did not challenge him (45-230) (48-22).

7. A member who sat on a court for the trial of an alleged ac-

cessory for the same offense is not necessarily disqualified. The validity of the challenge in such case is for the court to determine (30-1345, 1347) (40-375 [2]).

8. The following are not sufficient grounds for challenge: That a member is to be a witness for the defense; that he is accused's commanding officer; that he is junior to accused; that he has expressed an opinion as to the propriety of acts similar to those charged; or that he has had a disagreement with accused but declares that he has no prejudice against him (12-163).

8a. It is not considered good practice to place the commanding officer of the accused on the court which tries him. However, the accused's commanding officer is not disqualified by law, and when it appears that the officer was not biased and that the substantial rights of the accused were not injured by his presence on the court, the legality of the proceedings is not affected thereby (43-466, 467).

8b. Seven members of the court were challenged individually on the ground that they, as members of the same court, had sat at a previous trial of the accused on a different charge of which the accused was convicted, and were therefore prejudiced. Each member so challenged declared upon his oath that he had no knowledge of the facts in the present case and had not formed any opinion. Held: That court acted properly in not sustaining the challenges (44-377).

9. If the accused has information of grounds for challenge, the challenge should be made at the proper time before the court is sworn (12-163), and if accused, being so informed, is afforded the right of challenge and does not challenge, he will be held to have waived his right unless the disqualification is a statutory one which cannot be waived; but if the court, of its own motion, and without challenge, rules that such member is eligible to sit, no such waiver will be presumed (30-1350) (40-395 [47]).

9a. A colonel by whose order the charges were referred to the court for trial (being temporarily in command of the division on the date of such reference) sat as president of the court at the trial. The charge sheet, a copy of which was served on the accused, disclosed the facts, and accused had ample opportunity to challenge the colonel but did not do so. The record did not show any prejudice to the substantial rights of the accused, and the proceedings were held valid (43-182).

10. If a member states that he has knowledge of the facts and has formed an opinion, and, without challenge or objection by either side, is excused and withdraws, a challenge is implied and the proceedings are not thereby invalidated (30-1357).

11. Failure to challenge a disqualified member (other than one legally disqualified) either from ignorance or lack of opportunity, or the improper over-ruling of a challenge, may constitute prejudicial

error warranting a disapproval of the proceedings or mitigation of the sentence, but it will not necessarily affect the court's jurisdiction and the proceedings will be legal so far as to constitute a bar (see Article 40) to a subsequent trial (12-562, 563, 575; 30-1345) (40-395 [47]).

12. Primarily it is the function of the court to determine whether grounds for challenge exist, but where it clearly appears that such grounds did exist, and the court failed to sustain the challenge, it is prejudicial error (30-1345). The vote upon a challenge for cause must be by secret written ballot (30-Sup. 1344) (40-375 [1]). See Article 31 (Method of Voting).

13. A challenged member should not participate in proceedings upon the challenge, such as taking evidence and decision of interlocutory questions arising thereon relative to the challenge; but if a challenge is overruled and accused requests a continuance so that he may appeal to the convening authority, it is proper for the challenged member to sit in passing upon the question of the continuance. A refusal to grant such a continuance is within the court's discretion, and proper, unless the court clearly abused its discretion (30-1347) (40-377).

### III. PEREMPTORY CHALLENGES

14. A peremptory challenge should be made before accused has been arraigned (30-Sup. 1344); but it has been held that the substantial rights of the accused were not injuriously affected where the court allowed the prosecution to enter a peremptory challenge after panel had been accepted and some evidence taken (30-1346) (40-375 [3]).

15. In a common trial (where several accused are tried in common on separate, as distinguished from joint, charges) each accused is entitled to one peremptory challenge, and if such right is refused the court is not legally constituted and its proceedings are void as to all the accused. (45-274, 275).\*

*ARTICLE 19. OATHS. The trial judge advocate of a general or special court-martial shall administer to the members of the court,*

\* Accused A and P were brought to trial upon a charge alleging that, acting jointly, and in pursuance of a common intent, they committed three assaults with intent to murder three named individuals, in violation of A.W. 93; and accused B was charged separately with the murder of a named individual, in violation of A.W. 92. The murder was alleged to have occurred at a different time and place than the assaults, and P was not present at the scene of the murder. Two challenges for cause were made by the defense neither of which was sustained. On the question of peremptory challenges the defense contended that it was a "common trial" and that each accused was entitled to one peremptory challenge. The prosecution contended that it was a "joint trial" and that the accused were entitled to only one such challenge on its "side," and the court allowed them only one, which, it developed, was exercised on behalf of accused P. The defense then moved for a severance which was granted and P was allowed to withdraw. No further right to peremptory challenge was granted to B and he was convicted of all charges and specifications. The record was disapproved because the proceedings, as commenced, were in the nature of a "common trial," and each accused was entitled to one peremptory challenge. B had been deprived of such right (49-8-9) (M.C.M. 58d).

*before they proceed upon any trial, the following oath or affirmation; "You, A B, do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said Articles then, according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God."*

*When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form; "You, A B, do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God."*

*All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: "You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."*

*Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God."*

*Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God."*

*In case of affirmation the closing sentence of adjuration will be omitted. (See M.C.M. 61, 103.)*

#### ANNOTATION

1. The formality of administering the oath to the members of the court is an essential preliminary to entering upon the trial, and



the arraignment of accused and reception of his plea before the court is sworn is without legal effect (12-161).

2. Failure to administer the prescribed oath to all members of the court affects its jurisdiction, and the court, in such case, is not legally constituted and its proceedings are null and void (30-286, 1352) (40-376 [1]).

3. The oath is not administered to the court as a whole, but to the "members of the court," and when all are sworn at the same time the trial judge advocate should address each member by name (12-161).

4. A member added to the court after the others have been sworn, or one who was absent when the oath was administered to the others, must be separately sworn in full form before he takes his seat (12-161); and where an officer who had not been detailed on the court, was sworn with the others, and later detailed, but was not sworn after he was detailed, the court was held not legally constituted (30-1351) (40-376 [1]) (43-388).

5. If the record fails to show that the requisite oaths were administered to the members of the court and the prosecution, and the omission cannot be supplied by proceedings in revision, the proceedings are void (12-572) (40-376 [2], 403 [6]). If in fact the oaths were duly administered, but report of that fact was inadvertently omitted from the record, the omission may be supplied by proceedings in revision, in which the record may be changed to show the facts, but not otherwise. But where, in such case, the proceedings have been declared null and void, no corrective action by proceedings in revision, or otherwise, can be subsequently taken (30-1360) (40-395 [42]).

6. The oath covers "the matter now before you." If, after the court is sworn and accused is arraigned and has pleaded, additional charges are introduced setting forth a new and distinct offense, the members should be sworn again as to the new charges, otherwise the trial on such additional charges will be fatally defective (12-161).

7. The object of the secrecy imposed as to the vote of a member is to place him, when voting, beyond the reach of influences which might induce him to act contrary to his judgment. The term "court of justice" as used in the oath refers to a civil court and not a court-martial; but a statement in the record of the vote of each member, although a clear violation of the oath, will not invalidate the proceedings (12-161). The record should show that the requisite proportion, such as two-thirds, three-fourths, or all, as the case may be, concurred (M.C.M. App. 6).

8. The disclosure of the findings and sentence to a reporter, by permitting him to remain in the closed court, is a violation of the

oath and a grave irregularity, but will not invalidate the proceedings (12-162, 558).

9. The article does not prescribe by whom the reporter shall be sworn. In practice he is sworn by the trial judge advocate. He should be sworn anew for each case in which he officiates (12-500).

10. Failure to administer the oath to a witness, if the facts to which he testifies are admitted by the accused or otherwise proved, will not invalidate the proceedings (40-376 [3]).

11. Unsworn, unaffirmed statements are not admissible in evidence before courts-martial. Mere failure to object to the admission of such statements does not make them admissible, and when they constitute the sole evidence against the accused the record was held legally insufficient to support a conviction (42-14) (43-378).

12. The following oath administered to a Moslem witness was held to be a substantial compliance with this Article: "You swear by your God Allah that the evidence you shall give [etc.] so help you Allah." (44-184).

*ARTICLE 20. CONTINUANCES. A court-martial may, for reasonable cause grant a continuance to either party for such time and as often as may appear to be just. (See M.C.M. 52.)*

#### ANNOTATION

1. The question of continuance rests in the sound discretion of the court, and refusal to grant a continuance will not invalidate the proceedings unless it appears that the defense was materially prejudiced thereby (12-563) (40-377). Refusal of the court to grant a continuance to allow the defense to present evidence which is not material to the offense charged is not an abuse of discretion (44-146). A trial need not be continued until civilian counsel residing in the United States can reach a distant command where the accused is on trial (44-183, 184). But a seasonable and reasonable motion for a continuance for the purpose of securing special counsel must be granted (45-273). Where the court refused to grant a continuance to enable the defense to procure certain witnesses to an alibi asserted by accused at the investigation of the charges, and also in his own testimony at the trial, and defense counsel had moved for such continuance at the commencement of the trial and again at the close of the defense, it was held to be an abuse of discretion injuriously affecting the substantial rights of the accused. (46-274, 275.)

1a. When an accused had notice of the trial six weeks in advance and was represented by the regularly appointed defense counsel during that period, a refusal to grant a continuance upon grounds that accused had obtained civilian counsel only the night before the trial was held not an abuse of discretion (43-183).

2. It is generally good ground for continuance that the accused

needs time to prepare his defense or procure counsel, provided he had not been derelict in these respects, or that the charges upon which arraigned differ materially from those served upon him (12-165) (40-377). See Article 37, Annotation, par. 74. (45-273; 47-285, 286.)

2a. When an accused was not served with a copy of the charges, nor advised of the date of his trial prior to the day when the trial was held (January 15, 1943), and defense counsel first learned of his appointment less than two hours before the trial and had no opportunity to prepare the defense or even interview the accused, the court's refusal to grant a continuance was held to be an abuse of discretion, and the proceedings which resulted in a conviction, were declared illegal (43-138, 139). When the accused has been deprived of his fundamental right to prepare and present a defense in good faith, such action injuriously affects his substantial rights, and a conviction under such circumstances is illegal (43-305). (44-95). (45-173, 174, 273) (M.C.M. 52b).

3. An adjournment *sine die* has no more legal effect than a simple adjournment. The court cannot dissolve itself (12-521).

**ARTICLE 21. REFUSAL OR FAILURE TO PLEAD.** *When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty.* (See M.C.M. Chap. XIII.)

#### ANNOTATION

|   | Pars. |
|---|-------|
| I. NECESSITY FOR ARRAIGNMENT .....        | 1-4   |
| II. KINDS OF PLEAS .....                  | 5-6   |
| III. GENERAL ISSUE .....                  | 7-9   |
| IV. MOTIONS .....                         | 10-17 |
| V. CHANGE OF PLEA .....                   | 18-22 |
| VI. REFUSAL TO PLEAD DOES NOT BAR DEFENSE | 23    |

#### I. NECESSITY FOR ARRAIGNMENT

(See M.C.M. 62)

1. Formal arraignment before the court which tries the case is essential. Without it the proceedings are null; but if the record contains a statement of the pleas of accused to each charge and specification, there is a presumption that he was duly arraigned although the record fails to show that fact affirmatively (30-1246, 1368) (40-395 [32]). The pleas are not part of the arraignment (M.C.M. 62) the purpose of which is to apprise the accused of the offense of which he stands charged (49-60).

2. Failure to plead to the charge will not invalidate the proceedings (30-1366) (40-378 [1], 390 [1]); and if accused pleads guilty to the specification and not guilty to the charge, the court must decide whether the specification, as a matter of law, sustains the charge. If it is so held, the accused should be convicted of both the specification and charge (12-537).

3. Failure to explain to accused in open court the effect of his plea of guilty is not a material omission. Such explanation is presumed to have been given by counsel prior to trial (30-Sup. 1261) (40-396 [1]). But if it develops that the accused evidently does not understand the full implication of his plea, the matter should be fully explained to him in open court (M.C.M. 49g and 71).

4. A plea of guilty cannot confer jurisdiction upon the court in a case where it has none (30-Sup. 1436) (40-369 [4]). When accused, through mistake and misapprehension, pleaded guilty to a charge of breach of restriction when, in fact, he was under no restriction at the time of the alleged breach, it was held that the plea was improvidently entered and was not sufficient to support the finding of guilty (44-289).

## II. KINDS OF PLEAS

5. The only pleas are those to the general issue, viz. guilty, not guilty, and pleas corresponding to permissible findings, such as a plea of guilty to absence without leave under a charge of desertion (M.C.M. 63, 71, 78). All defenses and objections raised before trial on the general issue are presented by motions to dismiss, or motions for appropriate relief (M.C.M. 63).

5a. In a charge of absence without leave (Art. 61) the specification contained the phrase "having been alerted for overseas duty". The accused endeavored to except this phrase from his plea of guilty, but the court refused to permit him to do so, and he pleaded guilty as charged. No evidence was introduced in proof of the disputed allegation. The record was held legally sufficient to support the findings of guilty except the words quoted. The court was in error in refusing to permit the plea with exception (43-376).

5b. The plea of *nolo contendere* is not recognized by courts-martial. If offered, it should be treated as a plea of not guilty (44-6).

6. Evidence should not be pleaded. Thus matter in extenuation, such as good conduct, or that the charge was preferred through personal enmity to accused, should not be the subject of a plea, but should be offered in evidence under the general plea (12-516).

## III. GENERAL ISSUE

7. A plea to the general issue waives all objections to the form of the charges and specifications. Objections to matters of form, such as that accused is misnamed or misdescribed, or that there is

insufficient allegation of time or place, etc., should be made by plea in abatement, before the general issue, and errors that are capable of amendment may then be corrected by the trial judge advocate and the trial proceed in the usual way (12-519).

8. The counsel is presumed to have explained to the accused the effect of a plea of "guilty" prior to arraignment (30-Sup. 1261) (40-396 [1]; and in any case where it is obvious that accused understood the full import of his plea of guilty, the fact that no explanation was made to him will not be prejudicial error (30-1362). But see par. 3 above.

9. A plea of guilty to a specification which fails to set forth an offense is void (30-1445) (40-419 [1]).

#### IV. MOTIONS

10. Motions may be oral or in writing (M.C.M. 64c). Any defect or objection which may be determined without trial on the general issue may be raised before trial by reference to the appointing authority, or by motion to the court before a plea is entered. Objections such as the statute of limitations (Art. 39), former trial (Art. 40), former punishment (Art. 104), pardon, constructive condonation of desertion, lack of jurisdiction (Arts. 2, 12, 13 and 14) and fatal defects in the charges and specifications (Art. 46) should be presented by "motion to dismiss" before a plea is entered, but they may be asserted at any time during the trial; and any fatal defect (such as that the court was not legally constituted, or that the specifications do not allege any offense) is never considered as waived, whether asserted or not (M.C.M. 64a) (Arts. 47 and 50).

11. Defenses and objections based upon formal defects in the charges and specifications, substantial defects in the investigation and other pretrial procedure are to be raised by "motion for appropriate relief" before a plea is entered. If not so raised they will be considered as waived unless the court, in its discretion, grants relief from the waiver (M.C.M. 64b). A motion for appropriate relief is made to cure a defect of form or procedure which impedes the conduct of the defense. In addition to objections above mentioned, the following may be thus raised: prejudicial joinder in a joint trial, or misjoinder in a common trial (motion to sever). A motion for appropriate relief admits nothing as to the jurisdiction of the court or the merits of the case (M.C.M. 70). A "motion to elect" (i. e., to require the T.J.A. to elect which of two or more charges he will prosecute) is not proper and should never be granted (M.C.M. 70).

12. Other motions on issues raised during the trial, such as a motion for a finding of not guilty, should be made after the prosecution has rested or after the conclusion of all the evidence (M.C.M. 64d). A motion to inquire into accused's mental condition may be

made at any time before, or during, trial (M.C.M. 64d, also M.C.M. Chap. XXV). Other objections which are solely matters of defense or mitigation under a plea of not guilty are not proper subjects of a motion (M.C.M. 64g).

13. Upon a motion for a finding of not guilty submitted at the close of the prosecution, the court should consider whether there is sufficient evidence before it to support a finding of guilty as to each specification and charge designated in the motion. The matter is an interlocutory question to be determined by the court in closed session by a majority vote (Art. 43). If there is *any* substantial evidence which, with reasonable inferences and presumptions therefrom, *fairly tends* to establish each essential element of the offense, or offenses, to which the motion is directed, the motion should not be granted. The court may, in its discretion, defer action and permit, or direct, the prosecution to reopen his case and produce any further available evidence. If the motion is sustained, the court should forthwith enter a finding of not guilty of the offenses to which the motion, as sustained, is directed (M.C.M. 72). The trial may proceed on any other specifications and charges which remain, otherwise the court should adjourn and submit the record to the reviewing authority (M.C.M. 64f). See also Art. 37, Annotation, par. 37a.

14. Another motion predicated upon evidence is the defense of *res judicata*, which means that an issue of fact, or law, which has arisen in the case on trial has been adjudicated in a former prosecution of the accused for the same or another offense. For example, if B dies from injuries received in a felonious assault upon him alleged to have been committed by A, and for which assault A was tried by court-martial and acquitted before B died. If A is now tried for the homicide he can assert his former acquittal as *res judicata*, although the defense of former trial (Art. 40), not having been the same offense as that now charged, may not be available. The question of *res judicata* should be raised at the close of the prosecution's case, or whenever the facts relied upon can be established. Proof of the former adjudication can be made by the record of the former trial (M.C.M. 72b).

15. The burden of supporting a motion raising a defense or objection (except on questions of the statute of limitations or insanity) generally rests upon the accused, and he has the right to present pertinent evidence and argument upon questions thus raised (M.C.M. 64e). He may himself testify upon such special matters without opening the way to cross-examination upon the general issue. See Art. 24, Anno., par. 18.

16. The court may reverse its own ruling upon a motion at any time while the case is still in its hands. Such rulings are not final until approved by the reviewing authority (30-1367). So, a court may,

on reconsideration, revoke its action in sustaining a motion and proceed with the trial on the merits (30-1259) (40-395 [50]).

17. If the ruling of the court upon a motion amounts to a finding of not guilty (e.g. granting a motion to dismiss because of insanity of the accused, or a motion for a finding of not guilty) the case may not be referred back to the court for reconsideration (A.W. 40; M.C.M. 64f). As to motions granted by the court not amounting to a finding of not guilty, the appointing authority may, if he desires, return the record to the court, with a statement of his reasons, for its reconsideration. When the question is solely one of law, (e.g. jurisdictional) the court must accede to the views of the appointing authority; but if the matters in disagreement are issues of fact (e.g. whether there was a manifest impediment to the running of the statute of limitations) the court may act upon its own sound discretion and judgment. The order returning the record should contain appropriate directions as to proceeding with the trial. If the appointing authority agrees with the court's action, but the defects raised by the motion can be cured, he may take steps to remedy such defects and return the case to the court for trial, or completion of trial, on the merits. If he does not wish to do this, he should take action to conclude the case by the publication of appropriate orders (M.C.M. 64f). See A.W. 40, Annotation, paragraph 2a, Sup.

## V. CHANGE OF PLEA

18. The accused may, in the court's discretion, change his plea from guilty to not guilty, or *vice versa*, or withdraw a general plea and move specially. A request to change or modify a plea should usually be granted when made in good faith and not merely for delay (12-516).

19. A change of plea from guilty to not guilty, either voluntarily or by direction of the court, relates to the time of arraignment. The original plea cannot be considered as evidence of guilt, and it is highly improper for a trial judge advocate to so argue to the court (30-1363) (40-378 [2]).

20. If, after a plea of guilty, the accused makes statements or claims which are inconsistent with such plea, the court should order the plea changed to not guilty and proceed accordingly (12-517, 518, 520; 30-1365) (40-378 [3]); and if accused indicates ignorance of the effect of his plea of guilty the court should order a plea of not guilty to be entered. In such case evidence must be taken, as otherwise, the plea of guilty having been annulled, there would be nothing left to sustain the charge (30-1365) (40-378 [2]).

21. If, after a plea of guilty, the accused offers evidence inconsistent with such plea, the court should order it changed, and the record will be treated as though such action was taken. In such case,

if this evidence tends to show that accused did not commit the specific offense charged, but is guilty of another offense growing out of the same facts, it is the court's duty to call the variance to the attention of the accused and allow, or direct the plea to be changed (30-1364) (40-378 [3]).

22. After a plea of guilty it is not necessary for the prosecution to make out a case, but if the prosecution affirmatively disproves the specification, justice requires that accused be protected from the consequences of his ignorance, or that of his counsel, and be advised to change his plea (30-1364) (40-378 [3]).

## VI. REFUSAL TO PLEAD DOES NOT BAR DEFENSE

23. By refusing to plead the accused is not barred from making a defense, and where he was so advised by the trial judge advocate, and the record failed to show affirmatively that he was informed of his right to introduce evidence in defense, the trial was held to be invalid (30-1366) (40-395 [55]). When the accused **refuses to plead**, his identity is not admitted and must be proved (40-378 [1]).

\* \* \*

*ARTICLE 22. PROCESS TO OBTAIN WITNESSES. Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions. Witnesses for the defense shall be subpoenaed upon request by the defense counsel, through process issued by the trial judge advocate, in the same manner as witnesses for the prosecution. (As amended by S.S.A. '48, effective Feb. 1, 1949.) (See M.C.M. 105.)*

## ANNOTATION

|                                | Pars. |
|--------------------------------|-------|
| I. IN GENERAL .....            | 1-3   |
| II. SERVICE OF SUBPOENA .....  | 4-6   |
| III. WITNESS FEES .....        | 7-12  |
| IV. EXPERT WITNESSES .....     | 13-14 |
| V. WITNESSES FOR DEFENSE ..... | 15-16 |

### I. IN GENERAL

1. Subpoenas for witnesses before general and special courts are issued by the trial judge advocate, either upon his own initiative or by order of the court. If the witness is a military person the court may request his commanding officer to order him to attend (12-498, 510).



2. There is no authority for summoning, nor for the payment of fees or expenses, of civilian witnesses for a preliminary investigation (12-497; 30-1266) (40-428 [4]). They may, of course, be summoned for the trial.

3. The production of documentary evidence may be obtained by a subpoena *duces tecum* (12-510). Hospital records may be brought before an Army tribunal, such as a court-martial or court of inquiry, by subpoena (Articles 22, 23, 101) notwithstanding the law of the State in which the hospital is located provides that such records are privileged and are not admissible in evidence unless the privilege is waived by the party concerned (44-184, 185). When the desired records are in the custody and control of the military authorities it is the duty of the trial judge advocate, the court, or the convening authority to obtain their production without the necessity for legal process. (47-286, 287.)

## II. SERVICE OF SUBPOENA

4. Neither the trial judge advocate nor the court can order a civil officer to serve a subpoena. Usually it is served by an officer or noncommissioned officer of the army (12-498).

5. Civilians necessarily employed to serve subpoenas for military courts may be paid the fees and mileage allowed by local law for similar services (30-1404) (40-379).

6. Subpoenas for civilian witnesses residing in foreign countries should be sent through the State Department for service (12-526).

## III. WITNESS FEES

7. Civilian witnesses duly summoned, are entitled to be paid the statutory fees allowed witnesses "attending the courts of the United States." They are not entitled to mileage for two round trips, but they may be paid the per diem for continuous attendance upon the court including Sundays. They are not entitled to compensation other than regular fees (12-527; 30-1421) (40-380 [1]). Under current appropriation acts the fees for civilian witnesses before courts-martial are limited to \$1.50 per day (43-139).

8. Upon approval of competent authority the expenses of a necessary attendant for a civilian witness (*e. g.* a child, or inmate of an institution) may be paid, not on a mileage basis as a witness, but as an item of incidental expenses of courts-martial (30-1421, 1696) (40-380 [3]) (43-8).

9. An enlisted man of the naval branch of the service may be subpoenaed, but being an employee of the government, he is not entitled to regular witness fees, but is entitled to transportation and reimbursement for his actual expenses (30-1884) (40-p. 895).

10. A cadet of the Military Academy who attends a court-martial under orders as a witness is entitled to his actual expenses as an employee of the government. He is not entitled to an officer's mileage because he is not an officer (30-1784) (40-p. 895).

11. A retired officer must be subpoenaed as a civilian (30-Sup. 1422 *b*), but being in the employ of the government he is entitled to actual expenses only (40-p. 895). But a former officer who has been discharged is entitled to regular witness fees and mileage (40-380 [2]).

12. A civilian employee of a post exchange is entitled to witness fees the same as other civilians (30-Sup. 1422 *a*) (40-380 [4]).

#### IV. EXPERT WITNESSES

13. There is no authority to incur expenses for expert testimony except as provided in M.C.M. 107. An expert, not so employed but summoned as an ordinary witness, is entitled only to ordinary fees (30-1422) (40-395 [62]) (45-462).

14. An expert witness, duly summoned as such, is entitled to nothing more than the compensation agreed upon, either as fees or expenses (30-1422) (40-380 [1]).

#### V. WITNESSES FOR DEFENSE

15. The accused is entitled to have any and all material witnesses summoned in his behalf unless their testimony will be merely cumulative and will clearly add nothing to the strength of the defense; but he will rarely be entitled to demand the attendance of a chief of a staff corps, much less the President or Secretary of War, especially when some subordinate official can furnish the desired facts (12-525).

16. The refusal of the court to cause to be summoned a witness for the accused whose testimony would be material and not cumulative, is good ground for disapproval of a finding of guilty (12-559, 560). A conviction should not be permitted to stand where an accused has been deprived of the benefit of important and material evidence which might reasonably have caused the court to return a different verdict. (48-133.) As amended, the Article now specifically provides that *witnesses for the defense shall be subpoenaed* upon request of the defense counsel.

\* \* \* \*

**ARTICLE 23. REFUSAL TO APPEAR OR TESTIFY.** *Every person not subject to military law who, being duly subpoenaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a*

*deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than \$500, or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses: Provided further, That every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it or had under any of the provisions of this Act, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the Act of March 4, 1909, entitled "An Act to codify, revise, and amend the penal laws of the United States" (volume 35, United States Statutes at Large, page 1088), or any amendment thereof, shall be punished as therein provided. (See M.C.M. 105).*

### ANNOTATION

|   | Pars. |
|---|-------|
| I. IN GENERAL .....   | 1-2   |
| II. COURTS-MARTIAL NOT EMPOWERED TO PUNISH<br>WITNESSES FOR REFUSING TO TESTIFY ..... | 3     |
| III. WITNESSES NOT EXEMPT FROM ARREST .....   | 4     |
| IV. COMPETENCY .....  | 5-6   |

### I. IN GENERAL

1. A witness cannot excuse himself from attendance on the ground that his testimony would be immaterial, or for any other reason (12-526).

2. An officer testifying is subject to the same cross-examination as any other witness. Whether he has expressed animosity, made conflicting statements, etc., are proper questions from which no dis-

respect will be implied, and which he cannot refuse to answer (12-529). The willful and wrongful refusal of a military witness to testify before a court-martial is a violation of Article 96 and is punishable as provided by Article 64, being an offense closely related to willful disobedience of a superior officer (48-139, 140).

## II. COURTS-MARTIAL NOT EMPOWERED TO PUNISH WITNESSES FOR REFUSAL TO TESTIFY

3. A court-martial has no power to punish a civilian witness for refusal to testify (12-163). Neither the court nor the trial judge advocate has authority to arrest a witness suspected of giving false testimony: The proper method is to report the facts to the proper commanding officer or the convening authority (12-510).

## III. WITNESSES NOT EXEMPT FROM ARREST

4. A witness is not exempt from arrest while in attendance upon a court-martial but he should not be arrested if it can be avoided (12-528).

## IV. COMPETENCY

5. It is the province of the court to judge the competency of witnesses, and where no abuse of discretion is apparent, and the witness does not show incompetency, no error will be presumed. The mental capacity of an adult witness is presumed and the burden is on the party denying it to overcome such presumption (30-1419) (40-395 [63]).

6. When a youthful witness is ignorant of the obligations of an oath the witness should be instructed in advance, or during a suspension in the proceedings, by some competent person, such as a clergyman, as to the nature and moral consequence of false swearing. A momentary instruction during the trial is not sufficient (43-378).

\* \* \* \*

*ARTICLE 24. COMPULSORY SELF-INCRIMINATION PROHIBITED. No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him or to answer any question not material to the issue or when such answer might tend to degrade him.*

*The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct*

*to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial. (As amended by S.S.A. '48, effective Feb. 1, '49.) (See M.C.M. 127, 135b, 136b.)*

### ANNOTATION

|   | Pars. |
|---|-------|
| I. IN GENERAL .....                         | 1-4b  |
| II. CONFESSIONS .....                       | 5-13  |
| III. CONSPIRATORS AND JOINT OFFENDERS ..... | 14-16 |
| IV. CROSS-EXAMINATION .....                 | 17-19 |
| V. STATEMENTS OF COUNSEL .....              | 20    |

### I. IN GENERAL

1. The principle of the fifth amendment to the Constitution (that no witness shall be compelled to incriminate himself) has always been applied to military law although that amendment, itself, does not apply to courts-martial. Consequently an accused, when testifying as a witness in his own behalf, cannot be compelled to incriminate himself as to an offense in respect to which he has not voluntarily testified (12-502, 532, 533).\*

2. The privilege is personal and may be waived, but when a witness is ignorant of his rights the court should advise him. A military witness cannot persist in refusing to answer when the court has ruled that the question is not incriminating without rendering himself liable to charges under the 96th Article of War (12-526).

2a. Where a "written statement bordering on a confession signed by the accused" was not put in evidence, and there was no proof that it had been lost or destroyed, and the investigating officer before whom the statement had been taken testified as to its contents without objection by the defense, the failure to object was held to constitute a waiver by accused of his right to insist upon the production of the best evidence, to wit, the signed statement (47-62).

3. An investigating officer has no authority to determine whether a question is incriminating, and a person under investigation is within his rights in declining to answer an incriminating question although ordered by the investigating officer to do so, and his refusal will not constitute a disobedience of a lawful order (30-Sup. 1245a) (40-381).\*\*

\* The competency of the accused to testify or become a witness is conditioned upon his own request and he is therefore incompetent in the absence of such request (49-56-57). (M.C.M. 134d.)

\*\* Technically a person is not an "accused" within the meaning of this Article unless

4. The Article relates to testimonial incrimination only. It is permissible to compel an accused to exhibit his body in order to show whether it bears identifying marks (12-502, 526), and he may be compelled to appear before certain witnesses for identification (30-1249) (40-381). An accused may also be compelled to submit samples of his body fluids for laboratory analysis, and evidence of the results of such analysis is admissible without the consent of accused (45-174).

4a. The assertion by a witness of his right against self-incrimination cannot be used as the basis of an unfavorable inference against the accused (43-311, 312). This was a sodomy case in which the alleged participant availed himself of his privilege against self-incrimination.

4b. On the trial of an officer for making a false official statement, the fact that accused was not warned of his right not to incriminate himself by the officer to whom the false statement was made, is immaterial. The failure to give warning of rights under this Article is material on the question whether a confession or admission is voluntary and admissible in evidence, but the Article does not create a license to make false official statements (44-140).

## II. CONFESSIONS

5. Under this Article confessions are not admissible unless they are voluntary. If made under threats or promises, express or implied; they cannot be used (40-395 (10); 45-421; 47-9; 48-12-14). A confession obtained in an illegal manner, though voluntary upon its face, is not admissible (43-95; 47-120). See A.W. 37, Annotation, pars. 50, 51, and 51b.

5a. An accused in confinement in a stockade under an investigation for an alleged escape was in uniform. The provost marshal came in and, without warning accused of his rights, began questioning him as to why he was in uniform instead of fatigue clothing. In explanation accused told the provost sergeant that he "had escaped through a window in the latrine and had gone to visit his girl." At the trial for the escape the provost sergeant was permitted to testify to accused's confession. A conviction was set aside (49-61). It has formerly been held that the admission of a confession obtained in an improper manner did not vitiate the proceedings if there was other clear and compelling proof of guilt; but such holdings were over-ruled in a recent opinion in which it was held that: "The erroneous admission in evidence in a trial by court-martial of a confession which is obtained through coercion or duress violates the express provisions of

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charges have been preferred against him, and every witness appearing before an inspector general need not be treated as a potential accused. However, the text of the Article must be explained to all witnesses before the investigating officer begins his interrogation. If, during the investigation, it develops that the witness may be charged with an offense he should again be specifically advised of his rights under this article (49-7-8, 56).

A.W. 24, is highly prejudicial to the substantial rights of the accused, and the finding of guilty in such case cannot be sustained regardless of the other evidence in the record, clear and uncontradicted though it may be." (47-290; 48-13, 14, 23, 24, 129).\*

6. A signed confession containing the statement that accused was told that he need not answer any questions and that anything he said might be used against him, will, in the absence of any showing to the contrary, be presumed to have been voluntary (30-1296). But evidence that the accused was "warned of his rights" is not conclusive that the confession was voluntary when the circumstances under which it was made show coercion (43-377). When an accused was not advised by his interrogators of his rights under Article 24 until after his confession had been obtained and he had agreed to its reduction to written form, it was held that the oral confession was inadmissible because it was not voluntary, and such inadmissibility equally attached to the written confession (48-12, 13).

7. A confession or other statement made by a soldier to a chaplain, whether as a religious act as in the confessional, or as a matter of conscience between clergyman and penitent, is a privileged communication, unless expressly waived by the person concerned, and is not admissible in evidence before any investigating officer, court-martial or other military tribunal (46-4).

8. A stipulation signed by defense counsel and the accused is not admissible in evidence if, when offered by the prosecution, it is objected to by the defense. The admissibility of a stipulation depends upon the consent of the parties when it is offered; and no stipulation should be accepted by the court where any doubt exists as to the accused's understanding of what is involved (46-95).

9. Voluntary sworn testimony given by an accused as a witness in a prior proceeding can be used against him as an admission or confession (30-1287) (40-381, 395 [3]).

10. There is a distinction between an admission and a confession. An admission is a statement of fact or circumstance from which guilt may be inferred. A confession is an admission of guilt (30-1287) (40-395 [3] [10]).

11. The general rule is that the *corpus delicti* cannot be established by the unsupported confession of the accused. In other words there must be proof, other than the confession, that the crime in question has been perpetrated. Without some corroborative proof of the *corpus delicti*, the accused's confession is inadmissible, but such corroborative proof need not be conclusive (30-1287) (40-395 [11]) (44-423) (48-129, 130.) Mere proof that property allegedly unlawfully sold was missing is not sufficient corroboration of accused's confession that he did in fact sell such property. (47-287, 288; 48-14.) An

\* A voluntary confession is not invalidated by the fact that a "lie detector" was used during the interrogation, the results not having been disclosed in court (48-179, 180).

accused's confession or admission is not sufficiently corroborated by other confessions made by him. (48-16) (49-57-59-)\*

11a. The assertion by an alleged participant, in the offense (sodomy) of his privilege against self-incrimination cannot be used to establish the *corpus delicti* against the accused (43-311, 312). Where the only evidence against two accused in a sodomy case was the separate confessions of each accused, and there was no supporting evidence of the *corpus delicti*, the conviction was disapproved (43-377).

12. If, for any reason, a confession is inadmissible in evidence, isolated admissions taken from that confession are likewise inadmissible (30-1287) (40-395 [3]). Neither can they be used on cross-examination of the accused to "impeach" his testimony (45-50, 51).

12a. On the trial of an officer for larceny of \$145 from fellow officers, the prosecution offered a voluntary written confession which admitted the thefts, and also disclosed that accused, shortly before the larceny, had issued several worthless checks in payment of various gambling debts. Defense objected to the admission of that part of the confession pertaining to the bad checks on the ground that it involved offenses other than that for which accused was on trial. Held, that the confession, taken as a whole, set forth events leading up to, and in explanation of, the larceny, and that it was admissible despite the fact that offenses not charged were admitted therein (46-64).

13. If the accused, after due "warning," denies guilt, but later, without further warning, admits guilt, the confession will be regarded as voluntary, in the absence of evidence to the contrary (30-1296) (43-95). See A.W. 37, Annotation, pars. 47-53.

### III. CONSPIRATORS AND JOINT OFFENDERS

14. The rule (as stated in M.C.M. 127b) is that when several persons join in a common design to commit an offense, the acts and statements of each in furtherance of the common design are admissible against all, and it is immaterial whether such acts or statements were done or made in the presence or hearing of the others. It follows that, in the absence of proof of a conspiracy to commit the offense charged, a confession by one of two joint offenders may be used against him, but not against the other (30-1294) (40-395 [4]); and the incriminating acts of one party to a conspiracy, done after the conspiracy has been carried out, are likewise not admissible against the other party (30-1310) (40-395 [4] [12]). But an accomplice or fellow conspirator is competent to testify against another involved in the same offense even though his confession is not admissible against anyone but himself (44-284). A statement made out of

\* Possession by accused of a part of stolen property, coupled with proof that accused and her accomplices had access to it all, is sufficient corroboration of her confession that she and her accomplices had stolen the whole (48-180).



court by one joint accused in the presence of an alleged accomplice in the offense charged, and not denied by the latter, may be shown in evidence against both. (46-275, 276.)

15. In a joint or common trial an unsworn statement by one joint offender is confined to the one who makes it (M.C.M. 76, 127b).

16. The mere presence of an accused at the time and place of the commission of a crime, if he takes no part in it, and there is no evidence of his intent to participate, is not sufficient basis for inferring his participation as an accessory or principal (30-Sup. 1310) 40-395 [9]) (46-155, 156, 283, 284; 47-3). See also A.W. 37, Annotation, par. 40a.

#### IV. CROSS-EXAMINATION

17. When an accused testifies under the general issue in denial or explanation of the offense charged against him, any fact tending to prove his guilt of that offense is a proper subject of cross-examination, although the particular fact may not have been included in his direct testimony (30-1247) (40-395 [34]). But the accused may testify to facts bearing solely upon the "validity and voluntariness" of a confession which is offered in evidence without subjecting himself to general cross-examination as to the offense charged. (49-68-71.) (45-334, 335, 47-289, 290; 48-23.) In a common trial (not joint) accused "A," after testifying in his own behalf for the limited purpose of showing that his extra-judicial confession was not voluntary, was recalled by the trial judge advocate as a witness for the prosecution against accused "B" without objection by defense. "A" declined to answer any material question propounded to him because his answers might tend to incriminate him, and the court refused to compel him to answer. There was no cross-examination by the defense and accused "A" did not testify in his own behalf thereafter. Held that for the prosecution to compel "A" to go upon the stand, under the circumstances of this case, was prejudicial error necessitating disapproval of "A's" conviction. (46-333.) Although in military justice procedure the trial of two or more accused in a common trial constitutes a separate trial as to each accused so tried, such procedure is prescribed only as a matter of convenience and military expediency and is not intended or contemplated to deprive either accused of any rights, privileges or immunities to which he might otherwise be entitled. In such case the action of the trial judge advocate in calling the accused as witnesses for the prosecution, without their consent, to testify against each other was held to be fatal error (47-59, 60).

18. If an accused takes the witness stand, after being informed that he would not be cross-examined beyond the scope of his direct testimony, and testifies only to facts in support of a special plea to the jurisdiction, but on cross-examination other facts are elicited from

him which establish his guilt of the offense charged, and his special plea is overruled and no other evidence taken, a conviction will not be sustained (30-1247) (40-395 [31]). And the application of this rule is not dependent upon a previous representation that his examination would be confined to a limited purpose, but must be determined solely upon the scope of the direct examination (48-75).

18a. An accused was convicted of making a false official report, uttering worthless checks, and obtaining a loan by false representations, in violation of Article 95. In the course of his unsworn statement to the court, accused was interrupted by the president of the court and advised that it would be "towards his interest" to reveal certain information. The only evidence of falsity of the report, the worthlessness of the checks, or the making of the false representations, other than information so elicited from the accused by the president of the court, consisted of letters from various absent persons stating that accused had done the acts charged. The letters were inadmissible and the action of the president of the court in inducing the accused to amplify his unsworn statement was a violation of M.C.M. 76 prohibiting cross examination on an unsworn statement. The record was held legally insufficient to support the finding (42-272, 273). But when an accused, at the suggestion of the president of the court, made an addition to his unsworn statement, and the information thus elicited was not prejudicial to the accused, the error was held harmless (44-278).

19. Statements made in an inadmissible confession, may not be used to discredit the accused as a witness. The fact that, on cross-examination, he denies having made such statements does not render them admissible (30-1247) (40-395 [10] [34]) (45-50, 51).

## V. STATEMENTS OF COUNSEL

20. A statement made by defense counsel admitting the guilt of the accused, or facts tending to establish his guilt, should not be considered by the court unless it clearly appears that the statement was intended to be a deliberate admission on behalf of the accused, and was made with his full knowledge and consent (30-1288) (40-395 [5]).

*ARTICLE 25. DEPOSITIONS—WHEN ADMISSIBLE. A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of*

age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to, or, in foreign places, because of nonamenability to process, refuses to, appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases: Provided further, That a deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the appointing authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial: And provided further, That at any time after charges have been signed as provided in article 46, and before the charges have been referred for trial, any authority competent to appoint a court-martial for the trial of such charges may designate officers to represent the prosecution and the defense and may authorize such officers, upon due notice, to take the deposition of any witness, and such deposition may subsequently be received in evidence as in other cases. (As amended by S.S.A. '48, effective Feb. 1, 1949.) (See M.C.M. 106, 131.)

### ANNOTATION

|                                  | Pars. |
|----------------------------------|-------|
| I. IN GENERAL .....              | 1-2a  |
| II. AUTHENTICATION .....         | 3-4a  |
| III. RESIDENCE OF DEPONENT ..... | 5     |
| IV. CAPITAL CASES .....          | 6-6c  |
| V. AFFIDAVITS .....              | 7     |

### I. IN GENERAL

1. The sixth amendment to the Constitution which provides that an accused shall be "confronted with the witnesses against him" does not apply to courts-martial (12-164).

2. An application for a postponement of the trial to take a deposition is addressed to the sound discretion of the court and, if such discretion is not abused, the court's decision will not be disturbed (30-1281) (40-377).

2a. In the trial of an officer for non-support of his wife, her deposition is not admissible against him unless she consents thereto (45-127).

### II. AUTHENTICATION

3. A deposition taken before an official not authorized to administer oaths or take depositions in the jurisdiction where it was taken, is not admissible in evidence (30-1282) (40-383).

4. A deposition not properly authenticated is not admissible even though not objected to. Unless the deposition shows that the officer by whom it was taken was authorized to take it and that he was qualified to administer the oath, it is inadmissible. A court-martial has no

power to qualify or authorize a person to take a deposition or administer an oath (12-164).

4a. A deposition not signed by the witness is not admissible in evidence if objected to, and the convening authority may not direct the court to accept such unsigned deposition (45-88). See Article 37, Anno., par. 67b.

### III. RESIDENCE OF DEPONENT

5. A deposition of a witness who resides in the state where the court is sitting (or within 100 miles) is not admissible against objection, unless the court finds that it is admissible on account of some of the reasons named in this Article (12-165). When the court was sitting in a foreign country and a witness (a foreign citizen), who resided within ten miles, refused to appear and testify without an order from his own government, and there was no agreement between the governments of the United States and the country where the court was sitting for compelling the attendance of such witness, it was held that his deposition was properly received. The Article authorizes the use of depositions of witnesses who are not subject to the jurisdiction of the court-martial (43-429).

### IV. CAPITAL CASES

6. If the penalty under any Article of War is limited by executive order so as not to include death, though authorized by the Article itself, or the appointing authority has directed that the case be treated as not capital, then the offense is not capital and depositions may be used by both prosecution and defense; but under articles authorizing the death penalty where no restriction has been placed thereon, depositions may not be used except for the defense (40-382).

6a. A deposition may be introduced in evidence in proof of a non-capital offense although the accused is also charged with, and being tried for, a capital offense. If such deposition contains evidence which bears upon the commission of the capital offense the court should be carefully instructed that it is to be considered only in connection with the non-capital offense (42-269). If the court is not so instructed, and accused is convicted of a capital offense, the reviewing authority may cure the error by approving only so much of the findings as involve the non-capital offenses (44-54, 55).

6b. At a rehearing on a charge of mutiny under Article 66 the testimony given at the original trial by a witness who was not available at the rehearing was admitted in evidence for the prosecution over objection of the defense. Held: M.C.M. 117b (now 131b) prohibiting such testimony of absent witnesses in a capital case without consent of the accused was not applicable because at the original trial, accused was sentenced to fifteen years imprisonment, and the

court, on rehearing, could impose no greater sentence (Article 52). The rehearing was, therefore, not a capital case (45-175).

6c. In a capital case the defense counsel had procured a deposition but did not use it. The prosecution used it to impeach accused's testimony in several important particulars. Held: A violation of this Article. The provision is M.C.M. 119 (now 131a) that: "If the party at whose instance a deposition has been taken decides not to offer it, it may be offered by the other party," does not nullify the unambiguous limitation in Article 25 upon the use of deposition in a capital case (45-229). (M.C.M. 131a prohibits the use of such a deposition in a capital case without consent of the defense.)

## V. AFFIDAVITS

7. Affidavits taken *ex parte*, and not as depositions under this Article, are in no case admissible in evidence unless expressly consented to by the accused with full knowledge of his rights (12-536).

*ARTICLE 26. DEPOSITIONS; BEFORE WHOM TAKEN. Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths. (See M.C.M. 106, 131).*

## ANNOTATION

1. See notes under Article 25. Under Article 114 "any officer designated to take a deposition" is authorized to administer the oath thereto.

2. A deposition to be taken in a foreign country should be forwarded through the State Department with request to have it taken through diplomatic or consular agencies (12-164).

3. Necessary expenses of a consul, or the fee of a notary public, for taking depositions to be used before a court-martial are proper charges against the appropriation for expenses of courts-martial (30-1283) (40-380 [1]). Fees paid a notary public are governed by AR 35-4120 (44-7).

*ARTICLE 27. COURTS OF INQUIRY; RECORDS OF, WHEN ADMISSIBLE. The record of the proceedings of a court of inquiry may, with the consent of the accused, be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: Provided, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer. (See M.C.M. 131b.)*

## ANNOTATION

1. While the use of the proceedings of courts of inquiry in courts-martial as evidence on the merits is limited as prescribed in this Article, duly authenticated copies of such proceedings may always be used for the purpose of impeaching the statements of a witness who, it is proposed to show, had made different statements before the court of inquiry (12-179).

*ARTICLE 28. CERTAIN ACTS TO CONSTITUTE DESERTION. Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.*

*Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.*

*Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter. (See M.C.M. 146a.)*

## ANNOTATION

|                                       | Pars. |
|---------------------------------------|-------|
| I. DESERTION .....                    | 1-3   |
| II. FRAUDULENT ENLISTMENT .....       | 4     |
| III. SHIRKING IMPORTANT SERVICE ..... | 5-10  |

## I. DESERTION

1. This Article does not create a particular kind of desertion, or an offense which is distinct from that made punishable by Article 58 (Desertion). It is not a punitive Article but merely a rule of evidence, and charges of desertion as here defined should be brought under Article 58. This article merely declares that a soldier who abandons his enlistment contract is a deserter even though he immediately reenlists: his reenlistment does not constitute desertion—it is merely *prima facie* evidence of an intent not to return to his former enlistment from which he has not been discharged (12-131).

1a. While the second paragraph of this Article does not apply to officers, in the case of a lieutenant who went absent without leave and enlisted in the Marine Corps and was apprehended, tried, and convicted of desertion, it was held that his enlistment in the Marine Corps was evidence of an intent not to return to the Army (42-362).

2. In such case the soldier may be held to serve either one or both of his enlistments (12-413). The second enlistment is not void, but voidable only at the option of the government (12-414), and until so voided service under it is valid service and the soldier can be tried for offenses committed while so serving (12-608). He may be brought to trial for desertion and fraudulent enlistment; or he may be restored to duty without trial and held to serve either the first or subsequent enlistment, or both, at the option of the government; or he may be discharged without honor from the first enlistment and held to serve the second (12-609).

3. An accused who has deserted from several different enlistments, all except the first being fraudulent, may be tried for all such desertions and convicted of all, notwithstanding that the period of absence from the first includes the period of absence from the others (30-1516) (40-416 [3]).

## II. FRAUDULENT ENLISTMENT

4. A fraudulent enlistment under this Article is chargeable as a violation of the 96th (General) Article, and is punishable to the same extent as a violation of the 54th (Fraudulent Enlistment). In fraudulent enlistment under Article 28 (Certain Acts to Constitute Desertion), the accused being already in the military service, the receipt of pay or allowances is not an essential element of the offense (30-1472) (40-454 [58]).

## III. SHIRKING IMPORTANT SERVICE

5. The term "important service" includes all service designed for the immediate and direct protection or promotion of the public interest or welfare. It does not include service pertaining to ordinary training, such as drilling, target practice, maneuvers, practice marches, etc. (40-385). Nor does it include a transfer to a replacement depot preparatory to embarkation for foreign service (44-511, 512). But "embarkation for foreign duty" is "important service," and entrainment at a replacement depot for a port of embarkation and a continuous movement on to an overseas destination, is directly and immediately related to the actual embarkation. Absence without leave at the time of such entrainment, with knowledge of the contemplated movement overseas, not otherwise explained, is a fair basis for the inference of a specific intent to avoid embarkation (45-49, 50).

6. In time of peace, strike or riot duty, aiding the civil authorities in the protection of property or preventing disorder in time of public disaster, embarkation for duty beyond the continental limits of the United States, or, under some circumstances, border service, may be considered as "important service" (30-1515) (40-385).

6a. Mere absence without leave of a soldier from a port of em-

barkation, or other place, while his organization is under published orders for service overseas, is not, in all cases, *prima facie* evidence of an intent to desert, although the circumstances might justify an administrative charge of desertion (42-14). When a soldier was tried for desertion "with intent to shirk important service, to wit: to avoid the important and pending change of station beyond the continental limits of the United States for which preparations were being made by his organization during time of war" and was convicted, but it appeared that the accused did not know of such orders, and there was no competent evidence that the organization had received such orders, and accused was absent only about a week and when apprehended was in uniform and endeavoring to get back to his command, the board of review held that the record was legally sufficient to support a conviction of absence without leave only (41-103-105). When there is no evidence that the accused knew that the departure of his organization overseas was imminent or that his absence would avoid it, a conviction will not be sustained (42-323) (43-139, 140).

6b. An accused was assigned as a member of a "cadre" and ordered transferred from an organization in Tennessee to another organization in Massachusetts. It was not a secret movement and there was nothing to show that it was other than a routine matter connected with ordinary organization and training. The evidence showed that accused went absent without leave to avoid the transfer. Held that this act did not constitute a "shirking of important service" within the meaning of Article 28, but was a mere shirking of duty under Article 96. The same standards for determining what is "important service" are applicable in times of war and peace. By these standards transfers and movements for the organization and expansion of new units, or for training purposes of a routine character, not directly related to the maintenance of internal order, embarkation for foreign service, possible contact with the enemy, or other special functions of the Army, may not be classified as "important service" under this Article (42-269-273, 323).

7. Service with the Civilian Conservation Corps has been held to be "important service" within the meaning of this Article (30-Sup. 1515).

8. When a specification alleges desertion "with intent to avoid hazardous duty", or "with intent to shirk important service", the specific intent alleged must be proved, and proof merely of an intent not to return to the service is a fatal variance, and neither the court nor the reviewing authority may substitute a charge of the wholly different offense of desertion by absence with intent not to return (42-322, 323) (43-139, 140). But the accused may be convicted of absence without leave under Article 61 (43-140) (44-335, 336).



8a. In a trial for desertion with intent to avoid hazardous duty, viz., combat duty, judicial notice will not be taken of the location of our own and enemy troops, or the existence of hazardous combat operations, at a certain time or place. Proof of such hazards is required (45-485).

8b. Accused was transferred from an artillery organization to an infantry battalion. Upon arriving at the station of the battalion he did not report for duty but went absent without leave and remained absent until apprehended three months later. Upon apprehension he stated that he "would not serve in the infantry." During the entire period of his absence the infantry battalion to which he was transferred was committed to combat. His conviction of desertion by absenting himself without leave to avoid hazardous duty and to shirk important service was sustained (46-91).

9. In charging a type of desertion described in this Article, the intent, when an essential element, should be alleged, but if it is not, and the specification is merely that for desertion without specifying any intent, and the omission is supplied by evidence, a finding of guilty of one of the types described in this Article may be made (44-142). It is not duplicitous to allege in one specification both the intent to avoid hazardous duty and to shirk important service. The prosecution is free to prove either or both of the specific intents alleged (44-335, 336).

10. An accused was with his company before the enemy, but was in confinement in an unlocked cellar under guard pending trial for a recent absence without leave. He left the cellar without permission and went to the rear, to avoid enemy shell fire, and remained absent until apprehended. A conviction of desertion to avoid hazardous duty and shirk important service was sustained. Although accused, at the time of the offense, was in confinement and could not bear arms, he was available for routine duties which, under the circumstances, were hazardous. Furthermore his restriction might, at any time, be terminated by an order to perform full duty. Hence, hazardous duty and important service were reasonably imminent, and his absence enabled him to avoid and shirk such duty and service (45-174).

*ARTICLE 29. COURT TO ANNOUNCE ACTION. Whenever the court has acquitted the accused upon all specifications and charges, the court shall at once announce such result in open court. Under such regulations as the President may prescribe, the findings and sentence in other cases may be similarly announced. (See M.C.M. 81.)*

#### ANNOTATION

1. At any time before the record of trial has been authenticated and forwarded to the reviewing authority, the court may reconvene

of its own motion and reconsider and vacate its findings or sentence, or both, and make new findings and adjudge a new sentence (40-395 [37]). But after action by the reviewing and confirming authority and the publication of court-martial orders promulgating the sentence, there is no authority for any reconsideration of the case (40-Sup. 395 [37]). But see Art. 53—Petition for New Trial.

2. The court may revise its findings and sentence, on its own motion, prior to the completion of the record of trial and its transmission to the convening authority (43-185). See Article 40 (Limitations on Prosecution) Annotation, par. 23a; also Article 33 (Records of General Courts-Martial) Annotation, par. 5; Article 37 (Irregularities) Annotation, par. 65.

\* \* \* \*

*ARTICLE 30. CLOSED SESSIONS. Whenever a general or special court-martial shall sit in closed session, the trial judge advocate and the assistant trial judge advocate, if any, shall withdraw; and when their assistance in referring to the recorded evidence is required, it shall be obtained in open court, and in the presence of the accused and of his counsel, if there be any. (See M.C.M. 50.)*

#### ANNOTATION

1. When the record shows that the court was "closed" it will be presumed that in closing all requirements of the law were complied with and that all persons except members of the court withdrew (12-552).

2. The presence of the trial judge advocate or his assistant during a closed session of the court is prohibited by this Article and such presence is a grave irregularity (12-520); but since the enactment of the 37th Article (Irregularities) it has been held that, if it appears from an "examination of the entire proceedings" that the substantial rights of the accused have not been injured, the presence of the trial judge advocate, or assistant, during a closed session will not necessarily invalidate the proceedings (30-1418) (40-387) (44-110-113, 305). See Art. 74, Anno., par. 36. The action of the court in receiving and considering additional evidence in closed deliberative session is illegal and prejudicial to the substantial rights of the accused within the meaning of Article 37, although prosecution and defense counsel are present and consent thereto. A court-martial may require additional evidence upon its own initiative, but such evidence should be received *in open court* (47-60).\*

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\* The use by the court, in its deliberation in closed session upon the findings and sentence, of a transcript of the testimony which is the same in all respects as the transcript of record which was signed by defense counsel and duly authenticated, is not prejudicial to the accused's substantial rights (48-179).

*ARTICLE 31. METHOD OF VOTING. Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court. The law member of a general court-martial or the president of a special court-martial, shall rule in open court upon interlocutory questions, other than challenge, arising during the proceedings: Provided, That unless such ruling be made by the law member of a general court-martial, if any member object thereto, the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: And provided further, That any such ruling made by the law member of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, shall be final and shall constitute the ruling of the court; but the law member may in any case consult with the court, in closed session, before making a ruling, and may change any ruling made at any time during the trial. It shall be the duty of the law member of a general or the president of a special court-martial before a vote is taken to advise the court that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he shall be acquitted; if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt; that the burden of proof to establish the guilt of the accused is upon the Government. (As amended by S.S.A. '48) (See M.C.M. 78d, 80.)*

#### ANNOTATION

1. A tie vote is a vote in the negative. When a court-martial has come to a decision upon any question by the requisite vote no member is entitled to have a protest against such action entered in the record or appended thereto (12-521).

2. The president cannot adjourn the court against the vote of a majority of the members (12-521).

3. A vote upon a challenge for cause must be by secret written ballot (30-Sup. 1344) (40-375 [3]).

4. The appointing authority is not authorized during the course of the trial to direct a court to reconvene and receive certain testimony (e.g. depositions not properly authenticated) which the court had refused to accept (45-88). (See A.W. 88.)

5. It is the duty of the law member to rule in open court upon all

interlocutory questions (except challenges—see Art. 18). His ruling upon all such matters, except a motion for a finding of not guilty, and the question of accused's insanity including the question as to whether it has become an issue in the trial, are final and conclusive upon the court, subject to change by the law member at any time during the trial. His ruling upon a motion for a finding of not guilty, or the question of accused's sanity, is subject to objection by a member of the court and the law member should so announce when he makes his ruling. If any member objects such question must be decided in closed court by a majority vote. If there is no objection by any member of the court, the ruling of the law member stands. The law member may, if he so desires, consult with the court in closed session before ruling upon any question (M.C.M. 40, 51).

6. It is the duty of the law member to advise the court on questions of law and procedure which may arise in closed session. As a member of the court, he may request that the court be closed for that purpose although there is no immediate question for his decision pending. Questions upon which it is his duty to advise the court include such matters as an explanation of the essential elements of the offense charged, what lesser offenses, if any, are included, possible findings by exceptions and substitutions and the maximum punishment authorized (M.C.M. 40).

7. As prescribed in Article 31, the law member must, *in open court*, before closing to vote upon the findings, advise the court concerning the presumption of innocence and the evidence required to overcome such presumption and sustain findings of guilty (M.C.M. 40). The following is the suggested language for such advice: "The accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in his favor and he shall be acquitted. If there is a reasonable doubt as to the degree of guilt, the findings must be in a lower degree as to which there is no such doubt. The burden of proof to establish the guilt of the accused is upon the Government." (M.C.M. 78d).

\* \* \* \*

**ARTICLE 32. CONTEMPTS.** *A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder: Provided, That such punishment shall in no case exceed one month's confinement, or a fine of \$100, or both. (See M.C.M. 109).*

#### ANNOTATION

1. The power of a court-martial to punish for contempt is confined

practically to acts committed in its presence. It cannot punish, as for a contempt, any witness, civil or military, for neglect to appear in response to a summons, or for refusing, without disorder, to testify (12-162, 163). A person subject to military law who neglects or refuses to appear and testify when summoned is amenable under Article 96, and a civilian who so offends is punishable by the civil authorities as provided in Article 23. (M.C.M. 109).

2. The punishment which may be summarily imposed by a court-martial for contempt is limited as prescribed in the Article (12-508).

3. Where a contempt has been committed the proper course is to suspend the regular business, give the offender an opportunity to be heard, explain, etc., and then, if the explanation is insufficient, to impose punishment; resuming thereupon the original proceedings. The action is summary, no formal trial being required. Confinement in quarters or the guard house during the trial of the pending case, or a reasonable forfeiture, has been the usual punishment. In the case of a military person, instead of proceeding under this Article, he may be brought to trial under the 96th Article. This course is often adopted in our practice (12-162), and in such case the limitation of punishment provided by this Article does not apply (40-389).

4. A court-martial is authorized to exclude from its sessions any person who is, or it has reason to believe will be, disorderly (12-162).

5. A court-martial cannot punish one of its own members under this Article (12-162), but it may proceed under this Article against the trial judge advocate (12-509), or, inferentially, against the defense counsel.

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**ARTICLE 33. RECORDS; GENERAL COURTS-MARTIAL.** *Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the trial judge advocate; but in case the record can not be authenticated by the president and trial judge advocate, by reason of the death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial judge advocate, if there be one, in lieu of the trial judge advocate; otherwise by another member of the court. (See M.C.M. 85, 87c and App. 6.)*

#### ANNOTATION

|                               | Pars.  |
|-------------------------------|--------|
| I. IN GENERAL .....           | 1-6    |
| II. CORRECTION .....          | 7      |
| III. AUTHENTICATION .....     | 8-13   |
| IV. DESTRUCTION OR LOSS ..... | 14-15a |
| V. REVISION .....             | 16-21  |

## I. IN GENERAL

1. The trial judge advocate is responsible for the proper preparation of the record of proceedings, subject to the direction of the court (12-499). For the proper form and contents see M. C. M. 85 and appendix 6. Prior to the adoption of the present code of procedure there were many decisions upon this question not necessary to cite specifically here (See 12-549 to 553).

1a. In common trials (when two or more cases against separate accused are consolidated for trial) only one original record should be prepared with a copy for each accused. The original record should show separate findings, sentence and action, and separate general court-martial orders should be published as to each accused (44-226).

2. All proceedings, even though they are irregular, pertaining to the trial should be set out in the record for the inspection of the reviewing authority (12-498, 549). The record should set forth a complete history of the proceedings had in open court, so that the reviewing authorities may have before them all the evidence considered by the court. Places, distances or directions referred to by witnesses should be described by apt words or by reference to exhibits attached to the record (44-226, 227). When the record showed that the law member made an "off the record statement" and defense counsel stated, "I object to that statement by the law member and request that all this be included in the record," and the record did not show what the law member's statement was, it was held that such omission rendered the proceedings void (48-72).

3. When the trial judge advocate is himself a witness he may, if there be no reporter, record his own testimony as he does that of any other witness (12-499).

4. In the absence of obvious irregularity, the presumption is that the proceedings were regular and legal (12-557). When the record has been properly attested (See par. 5 below) it is presumed by law to be correct, and it cannot be collaterally attacked (12-571). However, it must show positively that all requisites of the statute essential to the jurisdiction of the court were in fact complied with (12-572).

5. The legal record is that which is finally approved by the court as attested by the president and trial judge advocate. The court, as a whole, is responsible for it. It is immaterial whether it was written by the trial judge advocate, or a clerk, or reporter, employed to assist him. When properly attested it is the legal record (12-559). And the accused is entitled *as of right* to have it forwarded to the reviewing authority. Until the "legal record" is thus brought into existence the court has plenary power over it for the purpose of making it "speak the truth" and for the further purpose

of revising its sentence in accordance with truth and justice (43-185). See Article 40 (Limitations on Prosecutions) Annotation, pars. 23 and 23a; also Article 37 (Irregularities) Annotation, par. 65.

6. Upon a rehearing (see Article 52) the testimony of witnesses who are not present may be read from the record of the first trial, provided such record is properly authenticated and identified, and in such case the original record may be bound with the record of the rehearing and such record will constitute a sufficient compliance with this Article (30-Sup. 1369a) (40-390 [1]) (M.C.M. 131b).

## II. CORRECTION

7. Errors and omissions may be corrected by the trial judge advocate or president prior to authentication so as to conform with what actually occurred. Such corrections should be initialed by the officer making them. The authentication is an act of the court, although accomplished by the trial judge advocate and president. The whole court may be assembled to verify the record, but it is not necessary (30-1369) (40-390 [2]). For correction by certificate upon return by the reviewing authority for the purpose, see M.C.M. 87b (See also 40-Sup. 390 [2a]). The omission from the record of a stipulation entered into between the prosecution and defense to correct a variance between the proof and the specification, may be remedied by a certificate of correction prepared as provided in M.C.M. 87b (44-278).

## III. AUTHENTICATION

8. The senior member of the court present at the termination of the trial authenticates the record as president (12-508, 522). Authentication by a member who did not sit in the trial is improper, and unless the error can be corrected by proceedings in revision the findings and sentence must be set aside. The record must show that the officer who signed it as president was detailed on the court and was present at the trial (30-1369) (40-390 [2]).

8a. In a certain case the record prepared by the official reporter was compared with an unofficial record made by a professional reporter employed by defense counsel, and discrepancies were found. A member of the court who authenticated the official record in the absence of the president, wrote a letter to the staff judge advocate stating that the unofficial record "had a truer ring," and that the official record was replete with errors, and omissions. This member, however, authenticated the official record because he thought he had no alternative. The proceedings were disapproved. It was the authenticating officer's duty to decline to authenticate a record which he was convinced was not correct (45-229, 230).

9. The presumption is that the officer whose name appears first on the list of members present at the trial was the senior in rank and president of the court, but where the two officers at the top of the list are of the same grade, and the second signs the record as "President, Senior Member Present," it will not be questioned (30-1279) (40-390 [2]).

10. If the record cannot be authenticated by the trial judge advocate who officiated at the trial, it should be authenticated by the assistant trial judge advocate if there be one who participated in the trial. In the absence, or disability, of both, the record is authenticated by a member of the court in place of the judge advocate, and in such case the president, in connection with his authentication, should state the reasons why the record cannot be authenticated by the trial judge advocate or assistant (30-1369) (40-390 [2]).

10a. See Appendix 6, M.C.M., for appropriate language to be used in connection with the authentication of the record by an assistant trial judge advocate, or a member of the court, in the absence of the trial judge advocate (42-272).

11. If two or more trial judge advocates have officiated in the trial, the one who is acting at its close is the one, and the only one, required to sign the record (12-499).

12. A trial judge advocate appointed after the conclusion of a trial is not competent to authenticate the record of such trial (12-522).

13. If the signature of the officer who signs the record as trial judge advocate does not conform to the name as stated in the convening order, the discrepancy is immaterial if the reviewing officer knows and certifies that the two designations refer to the same person (30-1369) (40-390 [2]). It is merely a matter of identity.

#### IV. DESTRUCTION OR LOSS

14. Destruction or loss of the record before action by the reviewing authority operates as an acquittal unless the court can be reconvened and a new record made from extant original notes (12-557, 558, 868); and when the reporter's notes were lost before being transcribed and a record was made by the trial judge advocate and defense counsel from memory and the report of investigation, it was held to be illegal (40-390 [3]). But loss of the record after the sentence has been confirmed and promulgated does not impair the judgment of the court, and constitutes no legal obstacle to the enforcement of the penalty (12-576).

15. It has been held that where a deposition which was received in evidence, and used by the court in its deliberations, became lost and was not available to the reviewing authority, or the board of



review, the incompleteness of the record was fatal to such of the proceedings as related to the charges and specifications to which the deposition pertained (30-1372) (40-390 [3]).

15a. An accused was convicted of desertion with intent to shirk important service. The record contained evidence that accused absented himself without leave while his organization was in "a staging area" and returned about three weeks later, after the organization had sailed overseas. The only evidence that accused knew that his organization was about to go overseas was a document signed by himself, acknowledging notice of that fact. This document was neither copied in, nor attached to, the record, and the only information as to its contents was a statement in the staff judge advocate's report on the charges. Held that the record was sufficient to support only a finding of absence without leave in violation of Article 61. Although there was actual evidence at the trial to support a finding, it will not be upheld on review if the record does not show it (42-358).

## V. REVISION

16. The sole purpose of proceedings in revision is to make the record conform to actual facts, in other words, to speak the truth. If an essential legal formality, such as the swearing of the members of the court and the trial judge advocate, was in fact omitted, such omission cannot be supplied by proceedings in revision (12-522, 572, 573).

17. It is not necessary that all members of the court who sat in the trial shall be present at proceedings in revision, but not less than five such members must be present, otherwise the court would not be legally constituted (12-522, 573) (43-427). The accused need not be present unless it appears that an injustice might result from his absence (12-523). If a member who did not sit in the trial participates in the revision, the proceedings in revision are illegal (12-560). This also applies to an assistant judge advocate who was not sworn and did not participate in the original proceedings and, in the absence of the trial judge advocate, took part in the proceedings in revision (30-1414) (40-376 [2]).

18. The revision here under consideration must be distinguished from a mere correction of the record made by the president or trial judge advocate, or the court itself before the record is authenticated and forwarded, or correction by certificate (see II above). The court must be reconvened for proceedings in revision. Revision of the record by the president or trial judge advocate, acting independently of the court, by erasure or interlineation, is unauthorized. The changes must be wholly made and recorded in the formal proceedings in revision, with necessary references to the page or part of the

record to which the correction applies, but leaving the original record precisely as it stands (12-523, 552).

19. Testimony cannot be taken at proceedings in revision (12-523). It seems, however, that the court's findings may be revoked and new findings made, but in such case the court must pass sentence upon the new findings (30-1307) (40-395 [37]).

20. There is no limit to the number of times a court may be reconvened for revision of its record. The order for revision should indicate the particulars in which correction is desired. Whether to make a proposed correction or change is discretionary with the court. The reviewing authority cannot order it made (12-522, 572, 573).

21. Where the members of a court-martial, or a number of them, have been transferred so that the court cannot be reconvened, no proceedings in revision can be held (30-1360), unless the members so transferred are, by orders of competent authority, placed under the jurisdiction of the convening authority for the purpose. The power to reconvene a court for proceedings in revision can be exercised only by the authority which convened the court in the first instance, or his successor in command (30-1270) (40-365 [1]).

\* \* \*

**ARTICLE 34. RECORDS; SPECIAL AND SUMMARY COURTS-MARTIAL.**  
*Each special court-martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may from time to time prescribe. (See M.C.M. 86, 87c, 91 and App. 7.)*

### ANNOTATION

1. It is a function and duty of an officer exercising general court-martial jurisdiction to supervise and examine the proceedings of inferior courts-martial within his jurisdiction (M. C. M. 87c, 91); and when he discovers material error, defect or omission which renders any such proceedings illegal, he is authorized to direct the approving authority to take supplemental or corrective action to vacate the findings of guilty and the sentence (45-8, 9).

2. If a soldier's pay has been withheld under an illegal sentence of a court-martial he should be reimbursed. In such cases appropriate administrative action should be promptly initiated by the appointing authority to restore to the accused all rights of previous grade of which he has been deprived under the unlawful sentence, as well as all pay withheld which has not been covered into the Treasury of the United States (45-8, 9).

\* \* \*

## THE ARTICLES OF WAR

**ARTICLE 35. DISPOSITION OF RECORDS; GENERAL COURTS-MARTIAL.** *The trial judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been acted upon, be transmitted to the Judge Advocate General of the Army. (See M.C.M. 85c, 87c.)*

## ANNOTATION

1. A copy of the record should be made for each accused whether desired at the time of the trial or not. If accused does not desire the copy it will be forwarded with the original record so that it will be available if the accused, or any one acting in his behalf, requests it (43-424).

\* \* \* \*

**ARTICLE 36. DISPOSITION OF RECORDS—SPECIAL AND SUMMARY COURTS-MARTIAL.** *After having been acted upon by the officer appointing the court, or by the officer commanding for the time being the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to the headquarters of the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the staff judge advocate: Provided, however, That each record of trial by special court-martial in which the sentence, as approved by the appointing authority, includes a bad-conduct discharge, shall, if approved by the officer exercising general court-martial jurisdiction under the provisions of article 47, be forwarded by him to The Judge Advocate General for review as hereinafter in these articles provided. When no longer of use, records of summary courts-martial may be destroyed as provided by law governing destruction of Government records. (As amended by S.S.A. '48, effective Feb. 1, '49.) (See M.C.M. 82b (4), 86, 87c, 91 and App. 8.)*

\* \* \* \*

**ARTICLE 37. IRREGULARITIES; EFFECT OF.** *The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: Provided, That the act or omission upon which the accused has been tried constitutes an offense de-*

nounced and made punishable by one or more of these articles: Provided further, That the omission of the words "hard labor" in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments.

### ANNOTATION

|  | Pars.  |
|--|--------|
| I. IN GENERAL .....                    | 1-3    |
| II. AS TO PERSONNEL                    |        |
| MEMBERS OF THE COURT .....             | 4-14   |
| TRIAL JUDGE ADVOCATE .....             | 15-16  |
| ACCUSED AND COUNSEL .....              | 17-19a |
| WITNESSES .....                        | 20-24  |
| INTERPRETERS .....                     | 25-27  |
| III. PLEADINGS                         |        |
| ESSENTIAL ELEMENTS AND DEFECTS .....   | 28-33  |
| VARIANCE .....                         | 34-36  |
| MOTIONS, ETC. ....                     | 37-39  |
| IV. EVIDENCE                           |        |
| IN GENERAL .....                       | 40-44  |
| ACCOMPLICE .....                       | 45-46  |
| CONFESSIONS, ADMISSIONS AND STATEMENTS | 47-53  |
| CHARACTER .....                        | 54-56a |
| DOCUMENTARY .....                      | 57-61  |
| HEARSAY AND OPINION .....              | 62-63a |
| SEIZED WITHOUT WARRANT .....           | 64     |
| V. PROCEDURE .....                     | 65-75  |
| VI. SENTENCE .....                     | 76-78a |
| VII. THE RECORD .....                  | 79-81  |

### I. IN GENERAL

1. The law presumes that public officers perform their duty, and this presumption continues until the contrary is shown (12-529). Unless it clearly appears to the contrary on the face of the record, it is in general to be presumed therefrom, not only that the court had jurisdiction, but also that the proceedings were sufficiently regular to be valid in law (12-570).

2. The conviction by a court-martial of a soldier who was incited and lured into the commission of an offense by agents of the government is contrary to public policy, and such inducement is fatal to the record (30-1248) (40-395 [35]).

2a. The mere "setting of a trap" to detect the perpetration of a crime is not a defense unless the crime is suggested by the police agent. Guilty intent to commit crime having been formed, any person may furnish opportunity, or even lend assistance to the criminal, for the purpose of detection and punishment (42-360). The defense of entrapment does not affect the jurisdiction of the court, and its decision thereon may not be questioned by a civil court in a collateral proceeding (i.e. *habeas corpus*): Citing a decision by the U. S. Circuit Court of Appeals, 133 Fed. 528 (43-133, 134). When a person has formed the intent to commit a crime and the agents of the Government merely lay a trap to catch him, or even cooperate with him in order to obtain proof of his guilt, the defense of entrapment cannot be sustained (44-55).

3. The Federal statute (18 U. S. C. 729) granting relief to persons erroneously convicted in courts of the United States does not apply to persons tried by courts-martial (30-Sup. 1283 a) (40-770 a).

## II. AS TO PERSONNEL

### *Members of the Court*

4. It does not invalidate the proceedings if a member who has been present during a part of the trial and absent for a part, subsequently resumes his seat and participates in the judgment and sentence. Nor is the legality of the proceedings affected by adding a new member pending the trial. In either case, however, the testimony which has been introduced and material proceedings had while the new or absent member was not present must be communicated to him before he enters or reenters upon his duty as a member. For a member who has been absent during a substantial part of the trial to participate in the findings and sentence is a marked irregularity warranting disapproval when there is reason to believe that accused may have suffered a material disadvantage therefrom (12-560, 561). The rule is that no member who has been absent during the taking of evidence shall thereafter participate in the trial unless, in an exceptional case, to prevent a failure of justice, and then all proceedings had during his absence should be read to him in open court before the case proceeds further, and the record should show that fact (30-1341) (40-395 [46]) (44-141).

5. When, after taking all the testimony, the court was practically reconstituted by the appointment of four new members, only one remaining who had heard the evidence, it was held to be not illegal, but a violation of the spirit of the law and regulations, and an irregularity which injuriously affected the rights of the accused (30-1349) (40-395 [46]).

6. A court-martial has no authority to authorize a member to be

absent. Such is the province of the convening authority or other competent commander; but such irregularity does not invalidate the proceedings (30-1342) (40-395 [46]) (44-41). But see Article 8 as to the necessity of the presence of the law member of a general court-martial when evidence is being taken or when voting on its findings or sentence.

7. In the absence of abuse of discretion, the relief of a member of the court by the convening authority during the progress of the trial is not an error injuriously affecting the substantial rights of the accused (30-1357) (40-395 [46]). But see par. 6 above as to law member.

8. When a challenged member sat and participated in the taking of evidence and the decision of interlocutory questions relative to the challenge, but did not participate in the final decision on the challenge, it was held improper, but as all questions were decided in accused's favor there was no prejudicial error (30-1347) (40-395 [48]).

9. It has been held not prejudicial where the prosecution was allowed to make a peremptory challenge after having accepted the panel and introduced some evidence (30-1346) (40-375 [3]).

10. It is prejudicial error for a member who has expressed an opinion on the evidence to sit on the court without disclosing that fact (30-1345) (40-395 [47]).

11. It is prejudicial error for an officer who investigated the case and formed an opinion to sit on the court without disclosing his disqualification and affording an opportunity to challenge him (30-1345). The same is true of an officer who concurred in the investigating officer's report and forwarded the charges recommending trial (30-1345, 1350); also of an officer who had expressed an opinion as to the character of the accused (30-1345). No accused should be so placed that his life or liberty may depend upon the willingness of a member of the court to reverse himself as an individual and nullify his former official act (30-1345) (40-375 [2], 395 [47]) (44-417, 418). See Art. 18 (Challenges) Anno., pars. 6 and 6a.

11a. When the officer who forwarded the charges to the convening authority, concurring in the investigating officer's recommendation for trial, is a member of the court, and the defense, upon being advised of the fact, does not see fit to challenge, the record is legally sufficient (42-15). And when the charges were forwarded for trial by order of a colonel (temporarily in command of the division) who later sat as president of the court at the trial, it was held not prejudicial error, especially in view of the fact that the charge sheet, a copy of which was served on the accused, disclosed the facts, and the accused had an opportunity to challenge and did not do so (43-182).

11b. It is not prejudicial error for accused's commanding officer to sit as a member of the court unless it appears that the substantial rights of the accused were injured thereby (43-466, 467).

11c. In a trial for desertion, a member of the court who, as a personnel officer, had certified the extract copy of the morning report showing accused's absence for the period alleged, and had also reported such absence, and other information shown on accused's locator card, to accused's regimental commander, remained silent when the members of the court were asked to state any facts believed to be a ground for challenge. He was not challenged. Held: As the only connection this member had with the case was that, in the course of his official duties, he had seen prima facie evidence of accused's absence without leave, in the absence of any showing that the substantial rights of the accused were prejudiced, the member's presence on the court might be considered as harmless (45-128).

12. For a member of the court to comment unfavorably, in open court, on the defense of the accused, is highly improper and will invalidate the proceedings unless the record proof of the offense is clear (30-1359) (40-395 [48]).

13. Inconsistency in the rank of a member caused by promotion after the convening order was issued should be explained in the record, but if not the omission is harmless if the officer who sat is sufficiently identified as the one named in the order (30-1348) (40-365 [1]).

14. When a member of the court is under orders to be discharged the reviewing authority may consult the official record to determine whether he had been discharged before the trial (30-1343) (40-365 [1]).

#### *Trial Judge Advocate*

15. That the trial judge advocate is the accuser is not necessarily prejudicial, but such practice is not favored (30-1267) (40-428 [7]). Where the trial judge advocate himself took the stand and gave improper testimony for the prosecution, and subsequently stated facts in argument which had not been established by evidence, the proceedings were held invalid (30-1417) (40-395 [7]).

15a. The use of prearranged signals by the trial judge advocate with a prosecution witness while testifying, and other "tricks" resorted to by the trial judge advocate indicating a determination to convict the accused in any way possible, constitute "gross chicanery and palpable fraud" not to be countenanced in any court, civil or military (46-196).

16. The presence of the trial judge advocate or his assistant during a closed session of the court is a grave irregularity (12-520), but since the enactment of the present Article 37 (Irregularities) it has been repeatedly held that such irregularity will not invalidate

the proceedings unless it affirmatively appears that the substantial rights of the accused were injured thereby (30-1418) (40-387) (43-305).

*Accused and Counsel*

17. Absence of the accused from the trial (after arraignment, see Article 21) will not, necessarily, invalidate the proceedings. When the accused was not present when the court was opened, after deliberation upon the findings, and counsel vouched to the correctness of the statement of service, and there was no evidence of previous convictions, the rights of accused were held not to have been prejudiced. The accused must, of course, be present for formal arraignment before the court which tries the case (30-1246, 1368) (49-60). But when the accused went absent without leave after the court had sustained his plea in bar of trial and announced dismissal of the case, and the accused had been released from confinement, and the court then reversed its action on the plea in bar and proceeded with the trial with the accused absent and having no knowledge that the case would be proceeded with, it was held to be prejudicial to his substantial rights (30-Sup. 1246) (40-395 [31]).

17a. The death of the accused before final action upon the record of his trial abates the proceedings (42-15).

18. When the accused, who had refused to plead, was erroneously advised by the trial judge advocate that he was barred from making any defense, and the record did not show that he was given an opportunity to introduce evidence in defense, the error was held fatal (30-1366) (40-395 [55]).

19. Failure to advise accused in open court of the effect of his plea of guilty is not material, the presumption being that counsel has performed his duty and explained the matter to accused before trial (30-Sup. 1261) (40-396 [1]). But see Art. 17, Anno., pars. 14 and 14a.

19a. On a trial for issuing worthless checks the accused testified that he had taken his pay voucher to a clerk in the Finance Office and verbally instructed him to send his check to the bank. This testimony was taken over objection on condition that it be verified. The defense failed to verify it, and it was stricken out. This was clearly erroneous. The accused's testimony was competent. The element of corroboration affected only its weight. However, other evidence clearly established accused's knowledge of insufficient funds and his lack of any definite arrangements for payment of the dishonored checks, and his conviction was sustained (43-269).

*Witnesses*

(See M.C.M. 134-137, 139.)

20. The failure of a witness to be sworn will not invalidate the



proceedings if his testimony was not material and might be disregarded without affecting the findings, or if accused admits the facts to which the witness testified (30-1423) (40-376 [3]).

20a. When an accused was convicted of taking indecent liberties with children of tender years, and the only evidence consisted of the unsworn unaffirmed statements of the children concerned, although the defense made no objection, it was held that, there being no legal evidence before the court, a conviction could not be sustained (42-14).

21. When a material witness shows strong personal hostility toward the accused, it is not sufficient that the witness denies such prejudice, but the defense must be allowed full latitude in cross-examination to ask such questions as might tend to disclose such animosity, and failure to do so will constitute error sufficient to warrant a disapproval of the proceedings (30-1420) (40-395 [56]).

21a. Although the wife of an accused may testify against her husband in his trial for her non-support, she cannot be compelled to do so, and in such case her deposition, unwillingly given, is inadmissible (45-127).

21b. A pre-trial statement may be introduced to impeach and contradict the testimony of a witness at the trial, but when the witness refuses to answer direct questions (*e.g.* on the grounds of self-incrimination) the pre-trial statement cannot be used in the total absence of any related testimony by such witness (46-92, 93). The testimony of a witness cannot be impeached by the showing of an extra-judicial inconsistent statement, unless he has an opportunity to explain, admit or deny his prior statement. This rule applies also to stipulated testimony where the witness is not in court and not available for examination as to the pre-trial statement (46-155).

22. Determination of the mental capacity of a witness rests in the sound discretion of the court. It is, of course, always to be considered in determining the weight of his testimony. The mental capacity of an adult witness is presumed and the burden is upon the party denying his competency to overcome the presumption by proof. If there is no abuse of discretion by the court in this matter, there is no error (30-1419) (40-395 [63]).

23. The competency of a child is not determined by age alone, neither does it rest solely upon the child's answer to a question as to whether he understands the nature of the oath. The matter is within the discretion of the court to determine from the child's appearance, conduct, apparent intellectual capacity, ability to distinguish between right and wrong, memory, accuracy, honesty, etc., whether his testimony is competent. The court may satisfy itself of his capacity either by direct questioning or observation of the

witness, and if the record does not disclose any abuse of discretion in this respect the action of the court in receiving the testimony will not be disturbed (30-1419) (40-395 [58]).

24. The matter of segregation of witnesses is within the discretion of the court. The rule stated in M.C.M. 135a is not inflexible (30-1419) (40-395 [60]).

#### *Interpreters*

(See M.C.M. 47.)

25. A member of the court may act as interpreter (12-558), but if the accuser so acts the proceedings will be disapproved unless it clearly appears that no injustice was done the accused (12-560).

26. A witness for the prosecution should not act as interpreter (30-1308), but the proceedings are not necessarily invalidated if he does (40-395 [60]).

27. The interpreter should report the answers of a witness in the first person, speaking as though the interpreter himself were testifying, but if he gives the answers in the third person the error is not prejudicial (30-1308) (40-473).

### III. PLEADINGS

(See M.C.M. Chap. VI.)

#### *Essential Elements and Defects*

28. The fact that charges are not sworn to, if no objection thereto is made by the accused, does not constitute a material error (30-Sup. 1267) (40-428 [7]).

28a. When the indorsement on the charge sheet referring the case for trial was not signed, but in the margin of the staff judge advocate's recommendation for trial was the note "O.K." over the initials of the appointing authority, it was held to be a procedural error which did not affect the substantial rights of the accused (43-236).

29. A specification describing the accused as a "private," but failing to state that he is a member of any organization in the army, is defective but not fatally so, and the defect may be cured by evidence (30-1408). The same is true where the accused is described as a "First Lieutenant" without naming his regiment or corps (30-1409) (40-428 [11]).

30. A specification should be set forth in simple and concise language. Its sufficiency will not be measured by the strict rules applicable to indictments in the civil courts, but it must contain by direct averment, or by reasonable implication, all essential elements of the offense sought to be charged (30-1406, 1452) (40-428 [8]). Although alternative pleading is improper, a specification alleging murder by strangling the victim "with his hands or by other means

forcefully employed" was held not fatally defective because the alternatives did not allege separate offenses, were not inconsistent, and did not render the charge uncertain (44-11). The admission of a "bill of particulars" as a means of curing a fatally defective specification is unauthorized in court-martial procedure. (44-338, 339).

30a. The use of the word "feloniously" in a specification charging an offense which is not a felony, though unnecessary, does not vitiate the pleading because the word may be used to describe an act which is wrongful and unlawful even though it is not a felony (43-305, 306). The specification as drawn, or as finally affected by the findings of the court or the action of the reviewing authority, must allege such facts as to constitute an offense in violation of an Article of War. Such allegations if omitted, may not be supplied by the proof (47-177.)

31. Time and place should be sufficiently alleged to show whether the statute of limitations has run and to advise the accused of the specific offense with which he is charged, also to identify the particular offense charged so as to constitute a bar to a subsequent trial for the same offense (12-485, 486); but if time and place are not definitely alleged, or are omitted altogether, if accused does not object, and time and place can be made out with reasonable certainty from the testimony, the defect is cured (12-558).

32. A vague allegation as to place will not necessarily prejudice the accused. The allegation of an offense committed in "American Expeditionary Force, France," while too vague, was held immaterial in the particular case (30-1410) (40-428 [12]).

33. A plea of guilty to a specification which fails to allege all material elements of the offense is void (30-1445) (40-419 [1]).

### *Variance*

(See M.C.M. 74.)

34. Variance between specification and proof as to date will not be fatal if time is not of the essence of the offense and the specific act charged is sufficiently identified by testimony. Proceedings in revision might well be had, however, before final action by the reviewing authority (12-486, 557) (43-340). In a prosecution under Article 64 (Assault or Wilful Disobedience of Superior Officer) a slight variance between specification and proof as to the name of the officer who gave the command and the exact language used, is not material where the officer was sufficiently identified as the one alleged and the essence of the command alleged was proved (44-233, 234).

34a. In a prosecution for homicide any variance between allegation and proof as to the identity of the person killed is fatal to the proceedings (44-191).

35. Misnomer or misdescription of the accused, when not objected to, and the accused is otherwise identified by testimony, plea, etc., will not invalidate the proceedings. A mere clerical error in spelling the name is harmless (12-485, 490, 558).

35a. Charging the offenses described in the specifications under a wrong article of war does not constitute prejudicial error (40-394 [2] (43-8) (47-66)). When a reviewing authority approved only so much of a conviction under Article 86 (Misbehavior of Sentinel) as included the lesser offense of being drunk on guard in violation of Article 96 (General Article) instead of Article 85 (Drunk on Duty), it was held that the designation of the wrong Article by the reviewing authority did not invalidate his action, but that the sentence should be limited as prescribed for the offense of being drunk on duty as a guard under Article 85 (43-309). But when an offense may properly be charged under either of two Articles of War it is prejudicial to the accused to try him under one Article (*e.g.* Art. 93) and then, for jurisdictional reasons hold, in the approval or confirmatory action, that the offense violated a different Article (*e.g.* Art. 94) (47-295, 296).

36. A material variance between the name of the accused in the specification and in the sentence is fatal unless susceptible of correction by proceedings in revision (12-560).

*Motions, etc.*

(See Art. 21, Annotation IV.)

37. In a joint trial the overruling of a motion to sever is not prejudicial where there was no abuse of discretion shown (30-1312); but when, in a joint trial of four accused, the defense of three was directly antagonistic to the fourth, the failure of the court to grant a severance was held to be fatal error (40-395 [49]). It is prejudicial error to deny a severance in cases where there are several defendants against some of whom there are charges which are separate and distinct from those against the others (47-288, 289).

37a. When the defense moves for a finding of not guilty at the close of the prosecution's case, and the court denies the motion, and it is not renewed at the conclusion of the case, any error in denying the motion is waived by the failure to renew it, and the case may be considered on the entire evidence (44-185, 186).

37b. A motion by the defense to add to the charges and specifications on trial should not be allowed by the court, because the appointing authority has exclusive and plenary power to designate who shall be tried, and for what offenses (44-191). But the defense may move to strike out a fatally defective specification and all evidence applicable thereto, and a denial of such motion by the court will invalidate a conviction of such specification (44-338, 339).

38. In a joint trial, where no conspiracy or common intent is alleged, and no motion to sever is made, no substantial rights of the accused are prejudiced (30-1313). Desertion is not a joint offense, but where three accused were charged jointly, and there were allegations and proof that each had committed the offense, and none of them objected to a joint trial, or to the court as constituted, it was held that there was no substantial violation of the rights of any of the accused (30-Sup. 1516) (40-416 [16] [17]).

39. Failure to advise accused of his right to plead the statute of limitations, when it is apparent that he may do so, but is ignorant of his right, will necessitate disapproval of the proceedings (30-1261) (40-396 [1], Sup. 396 [1]). (See also M.C.M. 49g). A special plea to the jurisdiction of the court on the ground that the convening authority was the accuser and prosecutor should be disposed of before proceeding with trial upon the general issue, and when such plea was overruled without permitting the defense to introduce evidence in support of it until after the prosecution had completed its case, it was held to be a violation of the substantial rights of accused and the proceedings were disapproved (45-335, 336).

#### IV. EVIDENCE

(See M.C.M. Chap. XXVIII.)

##### *In General*

40. In general the rules of evidence applicable in the civil courts apply to courts-martial, but over-technicality should be avoided (12-528, 529). In the trial for the larceny of Government property from a post warehouse, tally sheets, kept in the regular course of business to keep account of all property passing through the warehouse, are admissible to prove Government ownership of the articles alleged to have been stolen (44-468, 469; M.L.U.S. 755a; M.C.M. 130c).

40a. Circumstantial evidence alone, in order to warrant a conviction, must tend to prove all the elements of the offense charged and be sufficient to practically compel a conclusion of guilt (43-238, 311). (46-210; 47-287). An inference or presumption cannot be based upon another inference or presumption nor upon a mere conjecture (43-339). In other words the circumstances established by direct evidence must be such as to negative any presumption of innocence. See Article 92 (Murder and Rape) Annotation, par. 6g. (45-420, 421). See also A.W. 24, Anno. Par. 16.

40b. When a witness in his testimony identifies the accused, he may testify that he had, prior to the trial, identified him, and persons who heard such previous identification may testify to it (45-175).

41. The admission of incompetent testimony will not necessarily prejudice the substantial rights of the accused if, disregarding the

illegal testimony, enough legal evidence remains to support a conviction; but in such case the legal evidence must be sufficient to substantially compel a conviction, for then, and then only, can the reviewer say that the rights of the accused were not prejudiced by the illegal testimony (30-1284) (40-395 [2]) (44-185). In the trial of an officer for mishavior before the enemy under Article 75 in refusing to obey an order, given by the regimental commander, to advance with his command, the mental and physical ability of accused was put in issue by the testimony of six witnesses, who observed him at the time, that he was mentally and physically exhausted by several days of active combat with the enemy. The only evidence to rebut this defense was the testimony of the regimental commander who had not observed the accused, but based his conclusion that accused was not incapacitated entirely upon a telephone conversation with him at the time the order was given. Held: Clearly prejudicial to the accused's substantial rights. Conviction not sustained. (44-469). See Art. 75, Anno., par. 1.

42. A witness may be allowed to modify his testimony in a material particular if he so desires, but a refusal to allow him to do so will not necessitate a disapproval of the proceedings if the rights of the accused were not prejudiced thereby (12-561).

43. A material variance between evidence and allegations resulting in the conviction of the accused of an offense not charged, nor included in that charged, is fatal (30-1448) (40-412 [5]). Thus a variance between allegation and proof as to the place where an offense was committed, may be fatal: it was so held where an accused was charged with associating with a public prostitute in Augusta, Ga., and the proof was that he associated with her in Atlanta, Ga. (30-1451) (40-454 [12]); but it has been held that where there was no evidence to support the allegation as to place, the omission was harmless (30-1285). See M.C.M. 74 for procedure in case of material variance.

44. In the trial of a general prisoner, admission of evidence of a previous conviction which occurred before accused became a general prisoner is not authorized (30-Sup. 1300 a) (40-402 [5]).

#### *Accomplice*

(See M.C.M. 127b.)

45. The testimony of an accomplice does not necessarily require corroboration but it should be received with caution, and will be presumed to have been properly received unless the contrary appears (30-1286) (40-395 [57]). An accused may be legally convicted upon the uncorroborated testimony of an accomplice. The credibility of such testimony is to be determined by the same rules that govern the weighing of the testimony of any other witness (44-339).

45a. A conspiracy to commit an offense having been proven, the

acts and declaration of one co-actor in pursuance of the common unlawful design are admissible against any other co-actor on trial for such offense. Each participant is an agent for the others, so an act done by one in furthering the unlawful design is the act of all. It is not necessary that the conspiracy be alleged, or that a co-conspirator be named in the specification. In this case the undisputed testimony showed that the accused, a motor pool officer, and certain enlisted men of his unit (who were among the witnesses) had conspired to sell Government property, furnished for the military service, in violation of A.W. 94. The conviction of the officer was sustained (47-171).

46. The promise to an accomplice of immunity from prosecution if he will tell the truth at the trial of one with whom he was associated in the offense charged, has the sanction of law (30-1286) (40-395 [57]) (44-339). In a common trial (where separate charges against two accused are tried together) one of the accused cannot be compelled to take the stand as a witness for the prosecution against the other, because to do so would infringe upon his right, under A.W. 24, to remain silent. He may be a voluntary witness (46-333) (49-57).

*Confessions, Admissions and Statements* (See M.C.M. 127a.)

47. If the *corpus delicti* has not been fully established by competent evidence, a conviction cannot be sustained even though a plea of guilty has been entered (30-1444) (40-395 [11]). In other words, it must be shown that a crime has been committed before anybody can be convicted of committing it. An accused legally cannot be convicted upon his unsupported confession. There must be some other evidence that the offense charged has probably been committed. Failure to object to the introduction of an unsupported confession does not amount to a waiver (43-306) (44-100) (48-129, 130) (49-58).\*

48. It is not proper to receive a confession in evidence without some other evidence of the *corpus delicti*. In larceny, for instance, the mere fact that the property was missing and that accused had an opportunity to take it is not sufficient (30-1292 a) (40-395 [11]). When an accused pleaded guilty to larceny of a sum of money and admitted the theft on the witness stand, and there was evidence that immediately after the theft accused was in possession of a sum of money closely resembling that stolen in both amount and denomination, the conviction was sustained. The unexplained possession of the money was sufficient to support accused's admission on the stand and establish his guilt (43-341).\*\*

\* A voluntary admission, if corroborated by other competent evidence of the *corpus delicti*, is admissible against the person who made it although he had no personal knowledge of the subject matter. Lack of personal knowledge affects the weight, not the competency of such admission. This was a bigamy case in which an officer's statement on his pay voucher that a certain woman was his wife was held to be evidence that he knew she was still living when he married another woman (49-74).

\*\* Possession by accused of a part of stolen property, coupled with proof that she and her accomplices had access to it all, is sufficient corroboration of her confession that she and her accomplices had stolen the whole (48-180).

48a. In a prosecution for sodomy the refusal of the other participant in the alleged offense to testify on the ground of self-incrimination cannot be used to "bolster up" the case against the accused (43-311, 312).

49. The *corpus delicti* need not be proved *aliunde* the confession beyond a reasonable doubt, or by a preponderance of evidence, but some corroboration of the confession must be produced and such evidence must touch the *corpus delicti*. To illustrate: Under a charge of larceny of an article from the post exchange, the requirements of the rule are met by evidence tending to show, but not absolutely proving, that the article had been a part of the post exchange stock and had been wrongfully taken therefrom (30-Sup. 1292 a) (40-395 [11]) (43-377). On trial for issuing a worthless check when accused has confessed the offense, the protested check is sufficient evidence in corroboration of the confession to make the confession admissible, and taken together they will support a conviction (44-423). Mere proof that property allegedly unlawfully sold was missing is not sufficient corroboration of accused's confession that he did in fact sell such property (47-287, 288).

50. A communication to an Army chaplain by a person subject to military law, made in the relation of priest or clergyman and penitent, either as a formal religious act as in the confessional, or one made as a matter of conscience to a chaplain, is privileged against disclosure, unless expressly waived by the individual concerned, before an investigating officer, court-martial or other military tribunal (46-4). Where a full and complete confession contained recitals "that it was his free and voluntary act, that it was made without threats or promises after A.W. 24 had been explained to him, and that it was the truth," was objected to and evidence showed that such confession was in fact obtained by "official coercion," it was held to be involuntary and inadmissible (47-120) (M.C.M. 137b).

50a. The procuring of a confession by trick, promise, or false statement, which would tend to destroy the confidence of a soldier in his superior, is detrimental to the basic purpose which military justice is designed to serve, and a confession so obtained is not admissible before a court-martial (43-95, 96).

51. The mere statement that the accused was "warned of his rights" is not conclusive that a confession was voluntary if the circumstances indicate coercion (43-377). A soldier, accused of the larceny of a sum of money, was questioned by his battalion commander in the presence of the battalion administrative officer and accused's company commander and first sergeant. Accused was not warned of his rights under Article 24. Under compulsion and threats by the battalion and company commanders accused finally "broke" and admitted taking the money. Before signing a written statement he was



advised by the battalion administrative officer that he need not sign it if he did not want to, and that it could be used against him. Later the investigating officer interviewed the accused, advised him that he did not have to make a statement, and that if he did it could be used against him in court. Thereupon accused repeated in substance the facts contained in his written confession. At the trial the investigating officer was permitted to testify to these facts without objection. Accused was convicted. Held: The warning given by the battalion administrative officer before the signing of the written statement did not remove the influence of the battalion commander's conduct and make the written statement voluntary in character. The confession to the investigating officer should also have been excluded because accused was not advised that his prior confessions could not be used against him, and he may well have thought that he could not make the matter worse than he had already made it. Conviction disapproved (44-227, 228). Where an oral confession was obtained without warning accused of his rights under A.W. 24, and subsequently reduced to written form, it was held that neither the oral nor the written confession was admissible (48-12, 13).

51a. Upon apprehension on a charge of the wrongful taking and use of an automobile an accused was warned by a sergeant of Military Police that he need not make any statement and, if he did, it might be used against him in case of trial by court-martial. He made no statement at that time. Later when questioned, in the presence of the sergeant, by a captain of Military Police who gave him no warning, the accused admitted taking the car. Held that the confession was admissible in evidence. The fact that the warning was not given immediately before the statement was made did not affect its admissibility (43-95).

51b. A confession obtained by illegal methods ("third degree") is not admissible, and if used at the trial will vitiate a conviction (43-95). This is based upon decisions of the U. S. Supreme Court which had no relation to court-martial proceedings, but the principle is applicable in military law. It was formally adopted in a recent decision (overruling former opinions in conflict, in which it had been held that the erroneous admission of a confession was harmless when there was other clear and conclusive proof of guilt) as follows: "The erroneous admission in evidence in a trial by court-martial of a confession which is obtained through coercion or duress violates the express provisions of A.W. 24, is highly prejudicial to the substantial rights of the accused, and the findings of guilt in such case cannot be sustained regardless of the other evidence in the record, clear and uncontradicted though it may be." (48-13, 14). Under Article 24, as now amended, the admission in evidence of any "statement, admission, or confession" obtained by "coercion or unlawful influence in any manner whatsoever by any person" is specifically prohibited.

It has also been held by the U. S. Supreme Court that the making of a confession under circumstances which preclude its use, does not disable the confessor from making a usable one after those conditions have been removed (47-171, 172). But once an improper inducement to make a confession has been shown to exist, it is presumed to have continued unless such presumption is rebutted by the prosecution (48-73). But the mere fact that a confession was taken while accused was in unlawful restraint does not make it inadmissible if it is shown to have been purely voluntary, and is otherwise free from taint (48-74).\*

52. A voluntary confession containing a statement of events leading up to, and in explanation of, the offense charged is admissible although the statement of preliminary events contains admissions of other offenses not charged (46-64).

52a. Under a charge of murder a statement by the accused, after proper warning, that he killed the deceased in self-defense, not being a confession of guilt, is admissible (43-8).

52b. An accused was convicted of wrongfully taking and using an automobile without the owner's consent. The only evidence that accused did not have the owner's permission, was the testimony of a police officer that the owner stated, in the presence of the accused at the police station, that he did not give such permission. Conviction disapproved. While an incriminating statement of this character, made in the accused's presence and not denied by him, is admissible in evidence under certain conditions, such a statement should not be received when made while accused was in custody. The accused had a right to remain silent, and his failure to deny such statement, under such circumstances, may not be considered as a tacit admission of its truth (44-378) (45-4).

53. If there is a competent confession in writing, oral evidence of it is improper unless it is shown that the writing is not available (30-1295) (40-395 [12] [25]). When an accused has made pre-trial admissions against interest, falling short of a confession of guilt, parole testimony as to such admissions by those who heard them is admissible even though such inculpatory statements have been reduced to written form. But when an accused has made an out-of-court confession of guilt which has been reduced to writing, whether or not signed by him, parole testimony as to such a confession may not be admitted over accused's objection unless the writing has been lost or destroyed or is otherwise unavailable (48-73). See also A.W. 24, Annotation, Sec. II.

*Character* (See M.C.M. 125b, 139b)

54. Adverse character testimony in a doubtful case where accused

\* A voluntary confession is not invalidated by the fact that during the "interrogation a "lie detector" was used but its results were not disclosed in court (48-179-180).

has not placed his character in issue, is prejudicial (30-1290). Evidence that the accused has committed a like offense on other occasions than the particular one charged is prejudicial to the substantial rights of the accused, especially if the evidence as to the offense on trial is conflicting (30-1290) (40-395 [7]). In sex crimes, including sodomy, evidence of prior acts with the same party is admissible to show the inclination of the parties for each other, but evidence is not admissible of sodomy committed with persons other than the one involved in the case on trial (44-13).

54a. In order to qualify an accused's "wife" as a witness against him in a murder trial, evidence was received showing that she was not his lawful wife because of his previous marriage to another woman. The law member instructed the court that this evidence must not be used as the basis of an inference that accused had wilfully committed bigamy or any other crime. Held that these instructions cured any harmful effect which otherwise might have resulted (43-338).

55. When the good character of the accused has been placed in issue it can be rebutted only by proving his general bad reputation; proof of specific acts of misconduct is not admissible for this purpose (30-1290) (40-395 [7]).

56. In the absence of an attack upon the character of a witness, evidence of his good character is not admissible (30-1291) (40-395 [8]) (42-14) (44-95, 96).\*

56a. In a murder case evidence of deceased's character is not admissible when there is no basis for a claim of self-defense (43-339).

*Documentary* (See M.C.M. 129-132)

57. Certified copies of orders, reports, and other records must be authenticated by the authority having official custody of the originals (30-1298) (40-395 [17]) (44-469). Duly certified and authenticated copies of official records of births, deaths and marriages, foreign as well as domestic, are admissible in evidence as proof of the events which gave occasion to the making of them (48-16, 17).

57a. Morning reports are now prepared in triplicate and each of the three copies is "an original record." The second copy (yellow) is retained by the reporting organization, the third copy (green) becomes a permanent official record of the unit personnel section, and the first copy (white) is forwarded through channels to The Adjutant General where the eventual custody thereof rests. Thus the commanding officer of the reporting organization, the unit personnel officer and The Adjutant General are each the official custodian of

\* In the "Hesse jewels case" the defense sought to cross-examine the owners of the stolen property as to their participation in the affairs of the Nazi party. The law member sustained an objection by the prosecution and on review of the proceedings his action was upheld with the following comment: "Every case, however, stands more or less by itself . . . and in the instant case the Board is not convinced that the law member abused his discretion in refusing to allow defense counsel to pursue this line of cross-examination" (48-181-183).

the original morning report in a command, unit or branch of the Army, and as such may authenticate an extract copy thereof (44-96). If the original of the record in question is in the custody of some other officer such custody must be established by competent evidence before a copy authenticated by him may be accepted (46-194).\*

57b. An extract copy of the morning report which is "authenticated" by an officer "for" the custodian of the original is not admissible if objected to. Failure to object is a waiver of proper authentication (43-184). A morning report entry which does not identify the accused (describes him only as Private "B") is not admissible if objected to, unless connected up by other evidence (46-36).

58. Oral testimony as to what a record shows is not admissible if the record itself, or a duly authenticated copy, is available. The record is the best evidence (30-1300), 1302). A violation of the "best evidence" rule, in the absence of any explanation of failure to produce the record itself, or an authentic copy, will necessitate disapproval of a conviction if the accused was prejudiced thereby (30-1299). A common violation of this rule is found in cases involving absence without leave. Very often the First Sergeant testifies as to what the morning report shows with respect to the accused on certain dates without first putting the report itself, or a duly certified copy, in evidence. Usually the report itself is put in evidence afterwards, and thus the error in allowing the sergeant to testify as to what it shows, is cured. The record itself should be introduced first. The sergeant's testimony as to what it shows is improper. His testimony should be confined to the identification of the morning report where the original is used (as is quite often the case), and to matters of which he has personal knowledge without reference to the record, such as that accused had been refused a pass. If he has personal knowledge, independently from the record, that accused was absent without leave during the period in question he may so testify, but, with the record in, unquestioned, such testimony is merely cumulative and superfluous (40-395 [17] [19] [25], Sup. 395 [25]). A statement by the certifying officer in his "authenticating certificate" upon an extract copy of a morning report that the "extracted entries relate to the accused" is not admissible to prove that fact, there being nothing upon the face of the extract copy indicating to whom the entries relate (49-61, 62).

58a. By Executive Order No. 9216, August 7, 1942, the President amended paragraph 117a (now 129b) M.C.M. by adding a provision to the effect that the certificate of The Adjutant General, or an assistant, of any fact or event of record in the War Department, shall be accepted as *prima facie* evidence in any case when The Ad-

\* In the absence of all officers from a reporting unit, morning reports may be signed by an officer previously designated by the commanding officer of the reporting unit (49-59).

jutant General, or his assistant, shall certify that it is contrary to public policy to divulge the text of such record or its source (42-203).

59. A duly authenticated copy of a record has no greater probative value than the record itself, and if the record itself is questioned, the facts which it purports to show are thus put in issue (30-1298) (40-395 [17]). In a prosecution for absence without leave from 2 February 1944 to 8 March 1944 a duly authenticated extract copy of the morning report for 25 February 1944, introduced without objection, showed accused from "duty to a. w. o. l. as of 2 February, 1944". The officer who made the report testified that he had no personal knowledge of accused's absence until 16 February 1944 and did not record the accused as officially absent until 25 February 1944 because he wanted to make sure that accused was actually absent. The record was held legally sufficient to support only so much of the finding of guilty of the specification as involved absence without leave from 16 February to 8 March (44-337, 338). See Art. 61, Anno., par. 18a. The fact that an entry in the morning report was not within the personal knowledge of the clerk who prepared it is immaterial. It is sufficient that the unit commander who signed the report had personal knowledge of its correctness, and in the absence of evidence to the contrary, the usual presumption of regularity prevails (45-127). More recently, however, the Federal statute (M.L.U.S. 755a) relating to writings or records made or kept "in the regular course of any business" has been applied to morning reports. That statute provides in substance that such writings and records shall be admissible "in any court of the United States and in any court established by Act of Congress" as evidence of "any act, transaction, occurrence or event" shown thereby, and that "lack of personal knowledge by the entrant or maker may be shown to affect its weight but shall not affect its admissibility." (47-172-174; 48-17-20.) But this statute does not make admissible writings or records made solely with a view to prosecution or other legal action during the course of an investigation into alleged unlawful or improper conduct. (48-130, 131.) (M.C.M. 130c.)

59a. A "birth certificate" made from a record required by law, issued by the custodian of such record, is admissible as *prima facie* proof of all facts therein stated, including the identity of the child's father. (45-422.)

60. The probative value of an official record rests upon the legal presumption that public officers do their duty, and, when it is an official's duty to record certain facts coming within his personal official cognizance, that he does his duty and makes a correct record. Writing is of the essence of such evidence. Oral reports do not come within its category. There is a common, but mistaken, impression that any "official" report is admissible in evidence. An official state-

ment of a subordinate to his superior reporting facts ascertained pursuant to an order of the latter, although in writing, being hearsay, is not competent evidence of the facts therein reported. The hearsay rule means simply that a fact cannot be proved by showing that somebody stated it to be a fact, and if evidence is hearsay it does not become admissible because it was ascertained in the course of an official investigation (30-1300; 40-395 [21]; M.C.M. 126) (43-60, 191). (48-142, 143.)

60a. The testimony of a medical officer that accused had been hospitalized six days for acute alcoholism, it not appearing that the witness saw accused during that time or had personal knowledge of the fact, was held to be incompetent, and the mere failure of the defense to object was not a waiver of its incompetence (43-236).

61. Failure to object to incompetent or defective documentary evidence is not a waiver of such incompetency or defect unless it appears that accused had knowledge thereof (30-1298, 1299) (40-395 [2]) (42-212, 213) (43-60, 184, 236).

*Hearsay and Opinion* (See M.C.M. 125b, 126.)

62. The admission of hearsay evidence will not necessitate the disapproval of a conviction if there was sufficient competent evidence to substantially compel a conviction; otherwise, if the case is doubtful (30-1300) (40-395 [2]). See paragraph 60 above for a definition of the hearsay rule. A conviction based solely upon hearsay testimony, though not objected to, cannot be sustained (43-307, 308). When, at the trial, the victims of certain alleged offenses by accused in violation of Articles 92 and 93 failed to identify accused as the person who committed such offenses or was present thereat, and the only evidence tending to establish his identity was the testimony of an assistant provost marshal that the victims had, prior to the trial, identified accused, such testimony, being purely hearsay and not in corroboration of an identification in open court by said victims, the conviction was not sustained (47-9).

62a. In a murder case statements made by the deceased when he knew that he was seriously wounded, was in great pain, and was actually in a dying condition although he had not been so told, were held to be admissible as "dying declarations". Such circumstances warrant the inference that the deceased was "in fear of death" when he spoke (43-9). But when the victim made a statement tending to incriminate the accused the day after the assault, and died several days later from a disease caused by the blows he had received in the assault, it was held that such statement was not a "dying declaration" (45-4) (See M.C.M. 179a).

62b. In a trial for self-maiming while on guard the accused claimed that he had been assaulted by two masked men and that his

gun was discharged when one of them seized it. The officer of the day was permitted to testify that the sentry at the gate told him that no strangers had entered (pure hearsay), and the court elicited from a medical officer, who did not qualify as an expert, an opinion as to how accused might have wounded himself without causing powder burns. Conviction was disapproved (43-100).

62c. In a sodomy case certain witnesses testified that they saw the two accused in an attitude indicating an intent or preparation to commit the act charged but that they did not see the act committed. Another witness was erroneously permitted to testify that he had heard the eye-witnesses say that they had seen the act committed. This was injurious to the substantial rights of the accused and the proceedings were disapproved (43-143). It is a fundamental rule of evidence that a party may not impeach his own witness, except that if the witness gives testimony contrary to his previous statements to counsel, or at the preliminary investigation, such previous statements may be shown (44-55).

63. "Opinion" evidence is not admissible except where the witness, in a proper case, qualifies and testifies as an expert (30-1301) (40-395 [25a]) (45-51). Where stipulated testimony is of such character as to demonstrate patently and conclusively that the witness possesses expert knowledge of the subject matter, the stipulation that he would so testify constitutes an admission that he is fully qualified to speak as an expert (46-196, 197). An affidavit stating mere conclusions, when the affiant is not shown to have personal knowledge of the purported facts contained therein, is not admissible although not objected to (47-121). The members of a court are not bound to follow "expert opinion" without utilizing their own common sense and knowledge of human nature (47-10).

63a. In a prosecution for forgery, admission of the testimony of a purported handwriting expert, without establishing his qualifications as such, is erroneous (42-14). But the testimony of a witness that he is familiar with, or knows, the hand-writing or signature of a certain person qualifies such witness to identify a paper or signature purporting to have been written by such person (43-306). In such case the witness does not testify as a "hand-writing expert", but from personal knowledge of the hand-writing of the individual in question.

*Seized Without Warrant* (See M.C.M. 138)

64. Articles seized by the military authorities without proper warrant from the private residence of a soldier not on a military reservation cannot be used in evidence against him; but articles seized by military authorities from public quarters occupied by a soldier and his family on a military reservation may be used as evidence (30-1304) 40-395 [27]) (48-70). But Government property which has been stolen by a soldier and shipped to his home, may be seized without

a warrant by a Provost Marshal who has reliable information that it has been stolen, and immediate action is necessary to recover it (44-512). Authority to make or order an inspection or search of a soldier's person, or of a public building in a place under military control, even though occupied as an office, or as living quarters by a member of the military establishment, is regarded as indispensable to the maintenance of good order and discipline in a military command (48-75).\*

## V. PROCEDURE

65. A court may reconsider any finding before the same is announced or the court has opened to receive evidence of previous convictions; and the court may reconsider any finding of guilty on its own motion at any time before the record of trial has been authenticated and sent to the reviewing authority (M.C.M. 78d).

66. When the court requires the "assistance" of the trial judge advocate under Article 30 (Closed Sessions), failure to have the accused present will not invalidate the proceedings unless it appears that his substantial rights have been injured (30-1418) (40-387). But when a court called both prosecution and defense counsel into a closed session and received and considered additional evidence, it was held to be prejudicial error injuriously affecting the substantial rights of the accused within the meaning of this Article. Additional evidence must be received in open court (47-60).\*\*

67. Where the division judge advocate who was not detailed on the court in any capacity "made a short address" to the court during the trial, which, at his request, was not put in the record, it was held to constitute prejudicial error (30-1417) (40-395 [53]). When, immediately after final arguments, the court adjourned for the purpose of "consulting higher authority on certain questions which have arisen during the course of this trial," and four days later reconvened and immediately proceeded to its findings and sentence, and the record showed that the only questions which could have arisen were as to the guilt or innocence of the accused, upon which the court was not authorized to consult higher authority, the procedure was held prejudicial to the substantial rights of accused (30-1268) (40-395 [39]). (45-422, 423; 47-122) (See A.W. 88).

67a. When copies of a circular letter from the convening authority announcing a mandatory policy that all persons convicted by general courts-martial should be sentenced to dishonorable discharge were given to members of the court by the trial judge advocate after the court had deliberated upon the case the day before without result,

\* Immunity from search without warrant is a personal right which can be asserted only by the owner or lawful occupant of the premises searched, that is by the person whose rights have been invaded (48-172).

\*\* Use by the court, in its deliberations in closed session, of a transcript of the testimony in the case which is the same as the transcript of record, which was signed by defense counsel and duly authenticated, is not prejudicial to the accused's substantial rights (48-179).



and within thirty minutes the accused was convicted and sentenced to dismissal, it was held that the findings and sentence should be disapproved (40-Sup. 395 [55]) (See A.W. 88).

67b. When a court refused to accept certain depositions because they were not signed by the deponents, and had continued the trial with instructions to the trial judge advocate to "have the depositions placed in proper order", the convening authority, by official communication, directed the court to reconvene and admit the unsigned depositions in evidence. The court did so over objection by defense counsel. Held: The action by the convening authority was unauthorized, and the proceedings were disapproved (45-88). See also Art. 88.

68. Refusal of the court to allow the accused to present a written statement will render the proceedings fatally defective even though accused testifies as a witness (12-573).

68a. In a case which had occupied four days in trial and the record was 365 pages long, the court's restriction of defense counsel to fifteen minutes for his closing argument, when counsel had requested an hour and a half, was held to be a gross abuse of discretion, constituting reversible error under this Article (46-274.)

69. Failure to advise the accused of his rights as a witness, and comment and argument by the trial judge advocate upon the accused's failure to testify under oath, will invalidate the proceedings even though accused makes an unsworn statement (30-1417) (40-395 [55]) (45-230).

70. When, during the trial, the issue of insanity is raised, the steps provided by regulations (M.C.M. 112) must be taken, otherwise the proceedings will be invalid. When this question has become an issue in the trial, neither the accused nor his counsel can withdraw it. If raised before trial, and a medical board reports the accused to be sane, and on trial accused pleads guilty and does not raise the question of insanity, it is not necessary to call a member of the medical board as a witness (30-1250, 1251) (40-395 [36]). When the question of sanity becomes an issue the findings should include a determination whether (1) the accused, at the time of the offense, was "so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, both to distinguish right from wrong and adhere to the right" (M.C.M. 110b), and (2) the accused is sufficiently sane "intelligently to conduct or cooperate in his defense" (M.C.M. 110c) (43-424) (M.C.M. Chap. XXV).

70a. When, in a trial, the issue of insanity was raised, and the court, as an interlocutory question, found that the accused was sane and knew right from wrong, but made no finding as to his ability to adhere to the right, it was held that a specific finding upon that point was not required, it being included in the general finding of

guilty (42-360). In a prosecution for misbehavior before the enemy (Article 75) it was held that in determining the accused's mental responsibility at the time of his offense, it was proper for the court to consider the report of a psychiatrist containing the conclusion that "On the date the accused ran away from his battery his mental control had deteriorated to the extent that he was unable to refrain from his wrongful acts"; but it was its duty also to consider the facts in evidence in the light of its own knowledge of human motives and behavior under battle conditions. A conviction was sustained (44-228, 229). The members of a court are to use their "knowledge of human nature and ways of the world" in arriving at their findings. They are not bound to accept as proven fact the testimony of any witness, lay or expert (47-10). (In this case it developed, after the proceedings were approved, that two-thirds of the members of the court had acted under the impression that they were bound by the testimony of psychiatrists to the effect that accused was legally sane, and that they were not free to consider the evidence upon that point in the light of their own knowledge of human behavior).

71. Failure of the record to show that the effect of his plea of guilty was explained to the accused does not prejudice his substantial rights unless it affirmatively appears that such plea was inadvisedly made (40-378 [2], 396 [1]). See Art. 21, Annotation, par. 3.

72. Where several accused are charged separately with the same offense, the specifications being identical except the names of the accused, the cases may, with the consent of all the accused, be consolidated for trial, but such procedure is not recommended. It would be preferable to prefer joint charges (30-1309) (40-395 [33]). When in a common trial, one of two accused was convicted of murder (Article 92) and the other was found guilty of assault in violation of Article 96, it was held that the common trial (consolidated trial of two accused not jointly charged) having been directed by the reviewing authority, and no objection having been made by either accused, there was no legal impropriety in the proceedings (44-10, 11).

72a. In a common trial (consolidated trial of two or more accused not jointly charged) each accused has the right to one peremptory challenge, and refusal to grant such right will invalidate the trial as to all the accused (45-274, 275).

73. If a copy of the charges has not been furnished the accused or his counsel, and the defense moves for a continuance on that ground, a failure to grant the continuance is an abuse of discretion which will render a conviction illegal (30-1268) (40-377).

74. Where the convening authority ordered the court to proceed with the trial (in France) notwithstanding accused's motion for a continuance on the ground that all his witnesses were in the United States, which motion had been granted by the court, it was held to be prejudicial to the substantial rights of the accused (30-1268).

74a. When it appears that the accused has been deprived of his fundamental right to prepare a defense in good faith, a refusal of the court to grant a continuance is an abuse of discretion and will render a conviction illegal (43-305) (44-95) (45-273) (47-285, 286). (M.C.M. 52).

75. If the convening order fails to designate the time or place for the court to meet, or if the court meets at a different place from that designated in the order, its proceedings are not necessarily invalid (30-1270) (40-395 [40] [41]).

## VI. SENTENCE

76. If the evidence heard after a plea of guilty is not alone sufficient to convict, the penalty awarded may not exceed that stated in the court's explanation to the accused of the effect of his plea, notwithstanding that such explanation was erroneous. But if the evidence, without the plea, is sufficient to convict, the erroneous explanation may be disregarded (30-1443) (40-378 [2]).

77. In a joint trial separate sentences should be adjudged to each accused, precisely as if they had been tried separately; but where the record shows that "each of the accused" was sentenced to be dishonorably discharged, etc., the irregularity is harmless (30-1311 (40-402 [6])).

78. The validity of court-martial proceedings is in no way affected by the discovery, after trial and sentence duly approved and ordered executed, that accused was mentally incompetent, no issue of mental capacity having been raised at the trial. The only remedy is remission of the unexecuted portion of the sentence (30-1396, 1403) (40-395 [36]) (47-48). But see Art. 53—Petition for New Trial.

78a. The last proviso of this Article that the omission of the words "hard labor" in a sentence adjudging imprisonment, does not prevent the authorities executing the sentence from requiring it, is applicable to officers as well as enlisted men (44-8).

## VII. THE RECORD

79. The following irregularities or defects in the record will not invalidate the proceedings:

Failure to note an adjournment at the end of the record (12-559); failure to note the presence or absence of the assistant trial judge advocate (30-1414) (40-395 [54]); failure to note the absence of a member on reconvening after an adjournment, his absence having been noted at the beginning of the trial, or failure to note a member's absence when the record otherwise shows the fact (30-1343) (40-395 [46]); failure to note the presence of the trial judge advocate, accused, counsel, or reporter, where the record otherwise shows their presence (30-1246, 1414) (40-395 [31]); failure to ask accused whether the statement of service on the charge sheet is correct (30-1297); failure to show the place of meeting (30-1270) (40-395 [41]).

80. The charge sheet is a part of the record, and where the name, rank, and organization of the accuser does not appear in the record proper, the charge sheet may be referred to to identify him and determine whether he sat as a member of the court (30-1267) (40-390 [1]).

81. A deposition, received in evidence, is a part of the record, and its loss before action on the record by the reviewing authority will invalidate the proceedings on the charges to which the deposition related (30-1372) (40-390 [3]).

\* \* \* \*

*ARTICLE 38. PRESIDENT MAY PRESCRIBE RULES. The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules and regulations made in pursuance of this Article shall be laid before the Congress. (As amended by S.S.A. '48, effective Feb. 1, 1949).*

#### ANNOTATION

1. The Manual for Courts-Martial, having been prescribed by the President by authority of this Article and other provisions of law, the rules and regulations therein prescribed have the force of law.

2. When a particular procedure is not defined by law, regulation, or usage, a court-martial should, generally, be left to determine its own course. Thus a commander cannot properly order a court-martial to take testimony after a plea of guilty, but he may so recommend, and it is usually done (12-516, 517).

3. A court-martial, in its discretion, may sit on Sunday, or with closed doors. Usually, however, courts-martial are open to the public except when closed for deliberation (12-516).

4. Where a continuance is taken in one case, another case may be taken up before resuming proceedings in the first (12-516).

5. Either party may be allowed to introduce material evidence after the case has been formally closed, but before findings have been reached, but such procedure should not be allowed without good cause (12-518).

5a. "Viewing the premises" by a military court is authorized, in the discretion of the court, under exceptional circumstances, provided the court is accompanied by the accused and his counsel. Evidence cannot be taken at the "view." (See M.C.M. 75d as to an "escort," conduct at the "view" etc.).

6. Judicial notice may be taken of Army Regulations (30-1314); and a court-martial in France was authorized to take judicial notice of general orders issued by G.H.Q., A.E.F. (30-1315); but judicial notice may not be taken of orders issued by an authority inferior to the authority appointing the court (40-395 [29] [30]). Judicial notice may be taken of all rules and regulations promulgated by the Secretary of War (44-190). The legality of the constitution, organization and jurisdiction of a court-martial, when questioned, are not facts of which judicial notice may be taken, because a court-martial is a court of limited, not general, jurisdiction, called into existence by appropriate orders, and depending for the legality of its proceedings upon certain requirements such as the taking of an oath before embarking upon the trial of each case, the numbers of members present, and other matters which, in civil courts are generally supplied by judicial notice (47-179, 180) (M.C.M. 133).\*

6a. Judicial notice may be taken of the fact that an officer is married as shown by his "qualification card" filed by him as prescribed by Army Regulations (40-395 [29]); also of the form of a "post exchange credit slip" as prescribed by Army Regulations (40-451 [26]).

7. Courts-martial take judicial notice of the fact that a "state of war" or "time of war" existed on a given date (30-1317) (40-416 [5]). See M.C.M. 133a for an enumeration of matters of which judicial notice may be taken. But a court-martial cannot take judicial notice of secret operations and movements of an organization after its embarkation for overseas (i.e. that a certain organization is, at the time of trial, engaged in combat in Africa) (43-61).

7a. Judicial notice will not be taken of the disposition of our own and enemy troops at a specific time, or of the location of combat operations (45-485).

8. A Board of Review may take judicial notice of data in the records of the Branch Office of the Judge Advocate General in the Theater of Operations where the case is being considered, pertaining to a former trial of the accused (44-228).

9. The value of Government property issued for the military service is that given in the official price lists of which the court may take judicial notice (30-Sup. 1533). But this rule cannot be used when the articles in question are salvage and reclaimed items no longer in serviceable condition (47-297).

\* Judicial notice of foreign laws cannot be taken. They must be pleaded and proved like any other fact. Neither can they be proved by parol evidence if objected to; an official publication or duly authenticated copy is the best evidence (48-180-181).

## CHAPTER VI

### COURTS-MARTIAL—LIMITATIONS UPON PROSECUTIONS

*ARTICLE 39. AS TO TIME. Except for desertion or absence without leave committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before arraignment of such person: Provided, That for desertion in time of peace, rape or for any crime or offense punishable under articles 93 and 94 of this code the period of limitations upon trial and punishment by court-martial shall be three years: Provided further, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: Provided further, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law: And provided further, That in the case of any offense the trial of which in time of war shall be certified by the Secretary of the Department of the Army to be detrimental to the prosecution of the war or inimical to the Nation's security, the period of limitations herein provided for the trial of the said offense shall be extended to the duration of the war and six months thereafter. (As amended by S.S.A. '48, effective Feb. 1, 1949) (See M.C.M. 67).*

#### ANNOTATION

|                                       | Pars. |
|---------------------------------------|-------|
| I. IN GENERAL .....                   | 1-5   |
| II. IMPEDIMENTS .....                 | 6-9a  |
| III. WHEN STATUTE BEGINS TO RUN ..... | 10    |
| IV. TIME OF WAR .....                 | 11-14 |

#### I. IN GENERAL

1. This Article does not apply to proceedings before courts of in-

quiry nor to complaints of wrongs under Article 121 (12-579); nor does it prevent an escaped prisoner being held, upon capture, to serve the remaining portion of the sentence from which he escaped (12-581, 582). It does apply to prosecutions, after discharge, for frauds against the Government under Article 94 (12-172). Its application is to be based upon the offense described in the specification rather than the Article under which it is laid. The limitation on an offense properly chargeable under Article 93, but improperly laid under Article 96, is three, rather than two, years (M.C.M. 67).

2. The limitation is a matter of defense to be specially asserted, and the accused must be advised of his right to plead it where it is apparent from the specification, or the evidence, that he may do so; being so advised, if he does not plead the limitation he will be held to have waived the right (12-172; 30-1261) (40-378 [2], 396 [1]). It may be pleaded specially, or shown by evidence under a plea to the general issue, but in the absence of any evidence bearing upon the question, a general plea does not raise it (30-Sup. 1261) (40-396 [1]). (See M.C.M. 78a as to lesser offense barred by statute).

3. Although it is the duty of defense counsel to advise the accused, before trial, of his right to assert the defense of the statute of limitations (M.C.M. 43b, 45b), when it appears from the charges, or accused's plea, that the statute has run, *the court* is required to "bring the matter to the attention of the accused and advise him of his right" to assert such defense (M.C.M. 67). Unless the record shows affirmatively that accused was advised of such right, a conviction of an offense barred by the statute, cannot stand (M.C.M. 49g, 87b) (46-197-200) (49-61).

4. If the plea is not allowed the accused must be afforded an opportunity to present a defense upon the merits; and where a court permitted the withdrawal of a plea of guilty and sustained a plea of limitation, and subsequently, in proceedings in revision, in the absence of accused and without further plea or evidence, revoked its former action and proceeded to a conviction and sentence, it was held that there was no trial and that the findings and sentence were illegal and void (30-1261 (40-395 [31])).

5. For the purpose of a plea of the statute of limitations a morning report entry which is of secondary and hearsay origin (*e.g.* based upon a report received from another organization or detachment) is not sufficient to establish the date of an absence without leave (30-Sup. 1507) (40-395 [18]). But see Art. 37, Annotation, par. 59.

## II. IMPEDIMENTS

6. Under a plea of limitation the burden is upon the prosecution to prove the absence or other impediment to take the case out of the statute (30-1262) (40-396 [3]).

7. The fact that the offense was concealed, or remained unknown to the military authorities, or that the whereabouts of accused was unknown, will not prevent the running of the statute (12-171, 172).

8. If the period of limitation has run, but there is an allegation in the specification that the accused was out of the jurisdiction of the United States for a period sufficient to bring the case within the statutory period, and the accused pleads the limitation, evidence upon the question of such absence should be taken before decision upon the special plea. When the special plea was overruled and the case proceeded to trial under the general issue, it was held that inasmuch as the defense of the statute was equally available under the general issue, and as the evidence clearly showed that the accused was in a foreign country for a period sufficient to take the case out of the statute, his rights were not prejudiced (30-1262) (40-396 [3]).

8a. An accused was arraigned and tried March 29, 1946, for an absence without leave which initiated in Italy March 22, 1944, and the evidence showed that he was in Italy during his entire absence. He pleaded the statute of limitations (which under the Article then in force was two years). The plea was overruled upon the ground that accused had been "outside" the jurisdiction of the United States. It was held that since the accused was, during the entire period of his absence, within the territorial limits of a country in which our military authorities exercised court-martial jurisdiction, he was not absent "from the jurisdiction of the United States" within the meaning of this Article, and that his trial was in plain violation thereof, and was unauthorized (46-200).

9. Confinement in a prison in the United States is not an "impediment" to the running of this statute (30-1262) (40-396 [3]); and one who is employed on an Army transport is not absent from the "jurisdiction of the United States," particularly when he has not attempted to conceal his identity by an assumed name (12-174).

9a. The mere filing of a petition for a writ of *habeas corpus* by an accused, which petition is eventually dismissed, the writ never having been issued and the court-martial proceedings not having been stayed by the Federal court, created no impediment to the exercise of the military jurisdiction, and the time during which such petition was pending is not to be excluded in computing the period of limitation under this Article (46-200, 201).

### III. WHEN STATUTE BEGINS TO RUN

10. Escape, absence without leave, and desertion, are not continuing offenses, and the statute begins to run from the date when accused escaped from, or left, military control (12-174; 30-1260). In fraudulent enlistment under Article 54, the limitation runs from the date of receipt of first pay or allowances (30-1260) (40-396 [2]) (M.C.M. 67).



## IV. TIME OF WAR

11. In World War I a desertion occurring on or after April 6, 1917, and before March 3, 1921, was "in time of war" (30-352, 2203) (40-416 [4]).

12. Desertion from an organization in China during the "Boxer Uprising" (12-173) or in the Philippines during the Philippine Insurrection (12-410) was held to be "in time of war."

12a. As to World War II, the United States of America entered a state of war on December 7, 1941 (45-486).

13. When the United States is engaged in war, although the theatre of operations is outside the territorial limits of the United States, it is "time of war" at home as well as abroad (12-425).

14. The character of a peace time desertion which continues into, or through, a time of war is not thus changed to a wartime desertion (30-352) (40-416 [4]) (46-278).

*ARTICLE 40. AS TO NUMBER. No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.*

*No authority shall return a record of trial to any court-martial for reconsideration of—*

*(a) An acquittal; or*

*(b) A finding of not guilty of any specification; or*

*(c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some Article of War; or*

*(d) The sentence originally imposed, with a view of increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.*

*And no court-martial, in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited. (See M.C.M. 68, 72b).*

## ANNOTATION

|   | Pars. |
|---|-------|
| I. IN GENERAL .....                                     | 1-3   |
| II. COURTS OF INQUIRY, ETC. ....                        | 4     |
| III. DISCIPLINARY ACTION UNDER A.W. 104 ..              | 5-7   |
| IV. JURISDICTION OF FORMER COURT .....                  | 8-8a  |
| V. ACTION OF REVIEWING AUTHORITY .....                  | 9     |
| VI. SAME OFFENSE .....                                  | 10-13 |
| VII. WITHDRAWAL, DISCONTINUANCE, OR MIS-<br>TRIAL ..... | 14-16 |

|   |       |
|---|-------|
| VIII. TRIAL BY BOTH MILITARY AND CIVIL COURTS ..... | 17-20 |
| IX. RECONSIDERATION .....                           | 21-24 |
| (See also Article 52—Rehearings)                    |       |

## I. IN GENERAL

1. It has always been the law that the right to plead double jeopardy, like the statute of limitation as to time, may be waived by the accused (12-167). Therefore double jeopardy must be pleaded and proved in order to be asserted (30-1254) (40-397) [3]]. Mere failure to interpose the plea does not constitute a waiver. The record must show affirmatively that accused consented to the second trial with full knowledge of his rights (47-175).

2. Double jeopardy exists when the accused has had a former trial, by a court of competent jurisdiction, for the same offense, duly prosecuted to final conviction or acquittal, and, in case of conviction, finally acted upon by the reviewing, and in certain cases the confirming, authority (12-167).

2a. An accused was originally brought to trial for the larceny of a ring from Mr. H. An amended specification was filed charging him with the larceny of the same ring from Mrs. H. of which he was convicted. The reviewing authority disapproved the findings (because accused had been convicted of a different offense than the one originally charged) and restored accused to duty. He was again brought to trial for the same larceny from Mrs. H. and pleaded double jeopardy. Held that the reviewing authority's unqualified disapproval of the first record, including the findings and sentence under the amended specification, without ordering a rehearing (see Article 52) was a final consummation of that trial which operated as a bar to a subsequent prosecution for the same offense (43-424).\*

3. Consideration by the court of previous convictions in determining sentence is not a violation of this Article (12-541, 542).

## II. COURTS OF INQUIRY, ETC.

4. Previous proceedings of a court of inquiry, or an investigation by a board having no power to punish, do not constitute a double jeopardy (12-170); (30-1256) (40-397 [2]).

\* An accused was tried in 1948 for desertion "on or about December 9, 1941". (wartime). Prior to pleading to the general issue, defense made a motion in bar of trial on the ground that accused went absent without leave prior to December 7, 1941, (prior to the beginning of war) and his offense was therefore barred by the statute of limitations (A.W.39). The court "suspended action" on the motion because the specification as drawn alleged that the desertion occurred December 9, 1941. The prosecution's evidence tended to show that the desertion was on December 9 as alleged, while defense witnesses testified that accused went absent without leave on December 6, 1941. Thereupon the court was closed and upon opening the president announced that the plea in bar was sustained. The record was then duly authenticated. The reviewing authority returned it to the court for reconsideration of its ruling sustaining the plea in bar. The court, without further evidence, reconsidered its former action, overruled the plea, and convicted and sentenced the accused. The record was held not legally sufficient because the court's original action was tantamount to a finding of not guilty (having been based necessarily upon a finding of fact as to the date when the offense had been committed) and the reviewing authority had no power to return the record for reconsideration (48-183, 184). See A.W.21, Anno. par. 17.

## III. DISCIPLINARY ACTION UNDER A.W. 104

5. Authorized disciplinary action under the 104th Article of War constitutes a bar to trial by court-martial for the same act or omission for which the punishment was given, but it is not a bar to trial for an offense growing out of such conduct (30-1258) (40-462 [3]). The making of a false claim against the Government (Art. 94) is not a minor offense punishable under Article 104 (Disciplinary Power of Commanding Officer), and purported punishment therefor under the latter Article is not a bar to a trial by court-martial for the same offense (44-192).

5a. An accused, in a trial for an absence without leave, pleaded double jeopardy in that on his return from the unauthorized absence he had been "placed under restrictions" for a certain period and restored to duty. The evidence showed that the restrictions were imposed, not as a punishment for the absence without leave, but as an administrative measure to secure accused's presence pending review of a general court-martial record of his trial for a previous offense. Held that the plea in bar was properly overruled (46-334).

6. The reduction of a noncommissioned officer is not a punishment authorized under A.W. 104, consequently such reduction constitutes no bar to trial for the same act which caused the reduction. It may be taken into consideration, however, in determining the sentence (12-519; 30-1259) (40-397 [3]).

7. An admonition, or warning against certain conduct, not intended as a reprimand or other punishment under A. W. 104, is not a bar to trial for the offenses involved (30-1258) (40-462 [3]). See also Article 104, Annotation, Sec. VI.

## IV. JURISDICTION OF FORMER COURT

8. A former trial, in order to constitute a bar, must have been by a court having jurisdiction. In order to have jurisdiction the court must be legally constituted, otherwise its proceedings are void and constitute no bar (12-167; 30-1257) (40-397 [1]). So, when the court was not sworn (12-167; 30-1345), or the accuser sat as a member (30-1257) (40-397 [2]), the proceedings constitute no bar to a subsequent trial. The same is true when the case was tried by a court to which the charges had not been referred (30-1318) (40-395 [32]); but when a case was referred for trial to Captain W., trial judge advocate of a duly constituted general court-martial, and, before trial, another general court was convened by the same authority, of which second court, Captain W. was also named trial judge advocate, and Captain W. brought the case to trial before the second court, the proceedings were held valid in every respect (30-Sup. 1318) (40-397 [5]). And if a case is tried by a court to which it was not referred, the re-

viewing authority may ratify the court's action and act upon the sentence (44-54).

8a. If a noncommissioned officer is tried by a summary court without being informed of his right to object thereto (see Art. 14), and such proceedings are vacated and declared a nullity, it is not a bar to a subsequent trial for the same offense by a special or general court (45-3, 4).

## V. ACTION OF REVIEWING AUTHORITY

9. A former trial in which the reviewing authority erroneously disapproved the proceedings upon the ground that the court had no jurisdiction, is, nevertheless, a bar to a subsequent prosecution for the same offense. At the second trial the accused may plead the former jeopardy and thus raise the question whether the first court did, in fact, have jurisdiction (30-1257) (40-397 [1]) (45-49). See Article 14, Anno. par. 3.

## VI. SAME OFFENSE

10. In order to constitute double jeopardy the second trial must be for the same offense (12-167); and if it is, in reality, the same offense, though charged under a different description and a different Article, it is, nevertheless, double jeopardy. A soldier tried for absence without leave cannot legally be brought to trial again for the same offense charged as desertion (12-169; 30-1501) (40-397 [1]). In fraudulent enlistment under Article 54 a soldier cannot be tried again upon a specification based upon the same enlistment, but alleging other misrepresentations or concealments which were not known at the time of the first trial, because it is not the fraudulent representations, but the procuring of the enlistment by means thereof, and the receipt of pay or allowances, which constitute this offense (12-169, 170). It would seem from the decisions cited that if either offense involved includes the other, a second trial is barred. See also Art. 21, Anno. par. 14.

10a. The trial and conviction of an officer for being drunk and disorderly in uniform in a public place under identical specifications, one laid under Article 95 (Conduct Unbecoming) and the other under Article 96 (General Article) does not constitute double jeopardy. It should, however, be considered as a single offense in fixing punishment (43-96).

11. Trial, conviction, and disapproval of findings and sentence upon a charge of manslaughter is not a bar to subsequent trial for mutiny committed upon the occasion of the homicide, although the latter is alluded to in the specifications for mutiny as an aggravating incident (12-169).

12. Trial for taking a letter addressed to another person from the

mails and opening it, in violation of the postal laws, is not a bar to a subsequent trial for the larceny of the same letter and its contents (30-1255) (40-397 [1]).

13. A former acquittal may constitute a good defense to a subsequent trial for another offense although it is not a bar to the trial. An acquittal, based upon testimony of the accused upon a material point, is a complete defense to a subsequent prosecution of the same accused for perjury in so testifying if there is no substantial evidence in the second case in addition to, or differing from, that given in the first case (30-1255) (40-451) [53]. (See Art. 21, Anno., par. 14).

## VII. WITHDRAWAL, DISCONTINUANCE, OR MISTRIAL

14. The former trial must have proceeded to final determination. If, after arraignment, the charges are withdrawn and new ones preferred upon which the accused is rearraigned, or one of several distinct charges is withdrawn pending trial and after trial upon the remaining charges the accused is brought to trial anew upon the charge thus withdrawn; or if after trial begun, but continued without a finding, the accused is again brought to trial upon the same charge, there is no double jeopardy (12-167, 168) (46-276, 277) (49-62, 63).

15. If the first court fails to reach a finding, or becomes reduced below the required minimum of members, or is dissolved, or when for any cause, without fault of the prosecution, there is a mistrial, or the trial is terminated or the court dissolved before final acquittal or conviction, there is no former jeopardy (12-167, 168).

16. Withdrawal or *nolle prosequere* of charges is not a bar to subsequent trial. Charges once accepted and referred to a court for trial cannot be withdrawn except by order of the convening authority (12-490) (46-276, 277).

## VIII. TRIAL BY BOTH MILITARY AND CIVIL COURTS

17. A person subject to military law may be held answerable for both the military and civil aspects of the same act. Thus a soldier who kills his superior officer upon a military reservation may be tried by the civil courts or military courts for the homicide, and also by the military courts for the military offense of assaulting his superior officer in violation of article 64 (12-122, 168, 169). But the same act involving a crime cannot, after acquittal or conviction in a court of competent jurisdiction, be made the basis of a second trial for that crime in the same or another court, civil or military, of the same government. Although the same act, when committed in a State, might constitute two distinct offenses, one against the United States

and one against the State, for both of which the accused might be tried, that rule does not apply in territories where the civil courts derive their authority from the Federal government (The Grafton case, 206 U. S. 333, cited in 12-170).

17a. Conviction by a civil court for disorderly conduct is not a bar to the trial of an officer by court-martial for the same acts charged as a violation of Article 95. Article 40 prohibits a second trial for the same offense. Disorderly conduct in violation of the civil law, and conduct unbecoming an officer and a gentleman in violation of the military law are distinct offenses, and the civil court did not, and could not, try the accused for his purely military offense (46-333, 334). The same principle would apply in a case of conduct to the discredit of the military service under Article 96, or any case involving distinct offenses, one civil and the other military.

18. Trial by a State court is not a bar to trial for the same offense by a court-martial, but the fact that a sentence, or portion thereof, by the State court has been served should be taken into consideration by the reviewing authority (30-1428).

19. If the civil authorities demand delivery of a soldier to be tried for an offense for which he has already been tried by court-martial, he should be surrendered under the 74th Article, leaving the question of double jeopardy to be raised by *habeas corpus*, or otherwise, before the proper tribunal, it being a judicial question which cannot be decided by the military authorities (12-171).

20. In cases of double amenability, that jurisdiction which is first fully attached will generally be allowed to have precedence (12-168). When a homicide has been committed by a soldier in the discharge of his duty, it is to the advantage of the military service and the soldier that the military jurisdiction vest before the civil courts assume jurisdiction. Whenever a soldier commits an act which is liable to cause the civil courts to take action, and the offense is one which may be excused as being in the performance of duty, charges should be preferred immediately with a view to vesting the military jurisdiction (12-170).

## IX. RECONSIDERATION

21. The reconsideration of findings upon proceedings in revision is not a second trial. The original and revised proceedings are parts of one and the same trial (12-170); but when a sentence has been construed as operating to forfeit \$14 of pay for one month, proceedings in revision which purport to increase the sentence to \$14 per month for three months (which was what the court probably intended originally) are in contravention of Article 40 (30-Sup. 1394 (40-397 [6])).

21a. An accused stands acquitted of all material allegations which are excepted by the court in its finding of guilty. It follows that the

court, on a reconsideration by order of the reviewing authority, cannot find accused guilty as originally charged because to do so would be in direct violation of the prohibition contained in this Article against a reconsideration of any finding of not guilty (43-140, 141).

22. Reduction of a noncommissioned officer, or private first class, to the grade of private cannot be added to a sentence by proceedings in revision unless the mandatory sentence fixed by law for the offense upon which the conviction was had includes such reduction. A non-commissioned officer was convicted of an offense which was punishable "as a court-martial may direct". The court adjudged a sentence including confinement at hard labor, but failed to include reduction which, under the regulations then in force, was required when a non-commissioned officer was sentenced to confinement or hard labor without confinement, it was held that reduction could not be added to the sentence by proceedings in revision because the court was not required by law to impose a sentence in the first instance which would include reduction, and that the only course left to the reviewing officer was to approve only so much of the sentence as did not include confinement or hard labor without confinement (30-1394) (40-397 [6]).

22a. An accused was convicted of murder in violation of Article 92 and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for fifty years. The reviewing authority returned the record to the court for reconsideration because the sentence imposed was less than the mandatory sentence fixed by Article 92. Upon reconsideration the court sentenced the accused to dishonorable discharge, total forfeitures, and imprisonment for life. This procedure was correct. See paragraph (d) of this Article (43-426-428). An illegal sentence is null and void and in such case the reviewing authority should return the record to the court for proceedings in revision to revoke the void sentence and adjudge a new and legal sentence; a "rehearing" is not proper (43-910; 47-290, 291).

23. A court may reconsider *any finding* before the same is announced or the court has opened to receive evidence of previous convictions; and the court may reconsider *any finding of guilty* on its own motion at any time before the record of trial is authenticated and sent to the reviewing authority (M.C.M. 78d). Likewise the sentence may be revised by the court, upon its own motion, so as to increase or decrease its severity at any time prior to the authentication of the record and its transmission to the reviewing authority, but not thereafter, except as provided in Article 40, when the sentence is less than the mandatory sentence fixed by the Article under which accused was convicted (45-5, 6). See Art. 37, Anno. par. 65; also Art. 33, Anno. par. 5.

23a. A case was tried March 8, 1943. The record was completed, authenticated, and prepared for transmission to the reviewing authority March 20, 1943. On March 23, 1943, the court reconvened by order of its president and "amended the record" by adding a dishonorable discharge and total forfeitures to its original sentence. The amended sentence was approved by the reviewing authority on March 31, 1943. Held that the action taken by the court on March 23 was void and of no effect (43-184, 186). See Article 33 (Records of General Courts-Martial) Annotation, par. 5.

24. The sentence upon rehearing may not exceed that adjudged upon the original trial (30-1394) (48-133, 134). (See Article 52—Rehearings).



## CHAPTER VII

### COURTS-MARTIAL—PUNISHMENTS

*ARTICLE 41. CRUEL AND UNUSUAL PUNISHMENTS PROHIBITED. Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited. (See M.C.M. 115).*

#### ANNOTATION

|                                  | Pars. |
|----------------------------------|-------|
| I. IN GENERAL .....              | 1-9   |
| II. CUMULATIVE PUNISHMENTS ..... | 10    |

#### I. IN GENERAL

1. When the sentence is discretionary a court-martial may impose any punishment sanctioned by the customs of the service although not included in the list of usual punishments contained in regulations (12-542), but punishments formerly sanctioned, but now obsolete, such as wearing a ball and chain, shaving the head, and "drumming out" of the service are not allowable (12-546).

2. Military duty cannot be imposed as a punishment, not because it is cruel or unusual, but because it would tend to degrade it to the prejudice of the service. Thus extra tours of guard duty, or an additional period of service after the expiration of a soldier's enlistment, would be improper punishments (12-547).

3. A sentence to solitary confinement is unauthorized (12-561) although solitary confinement may be imposed as a disciplinary measure for the infraction of prison regulations.

4. An indefinite sentence to confinement is illegal (12-561). The legality of a sentence to confinement at hard labor "for the duration of the war plus six months" is extremely doubtful (43-141).

5. A sentence to carry a loaded knapsack weighing 24 pounds every alternate hour each day, from sunrise to sunset, has been held to be "excessive and exceptional" (12-575).

6. A forfeiture of pay imposed by a court-martial as a punishment,

unlike a fine imposed by a civil court, cannot be paid in cash, but is enforceable against pay only, and continues until pay accrues and has been collected to satisfy it (30-248) (40-232). See Article 45, Anno. par. 10c.

7. While this Article is applicable directly to sentences of courts-martial, violations of it by individuals subject them to charges under the 96th or other appropriate article. Thus tying up by the wrists, immersing in water, striking or flogging, gagging, have all been held to be improper methods of discipline (12-583, 584; 30-1490) (40-398). See Article 96, Anno. par. 4h.

8. A sentence of dismissal for an officer who addressed abusive language to a sentry who refused, upon the officer's order, to leave his post to care for the officer's horse, was held to be a reasonable punishment because to interfere with a sentry in the performance of his duty is a serious offense (12-584).

9. When a reprimand is imposed, its quality is discretionary with the officer who is to execute it, and he may make it as severe as he deems appropriate without being chargeable with adding to the punishment (12-565, 566).

## II. CUMULATIVE PUNISHMENTS

10. Sentences to confinement imposed at two successive trials, although approved on the same day, are cumulative; also where a prisoner under sentence is brought to trial a second time and sentenced to confinement. A cumulative sentence will commence on the date when the pending sentence terminates whether by expiration or remission. When a prisoner escapes, enlists, deserts, is apprehended, tried for desertion, convicted and sentenced to confinement, the sentence is cumulative and takes effect upon the expiration of the sentence from which he escaped (12-581).

*ARTICLE 42. PLACES OF CONFINEMENT; WHEN LAWFUL. Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year: Provided, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles*

*by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: Provided further, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: Provided further, That persons sentenced to dishonorable discharge and to confinement not in a penitentiary shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary (See M.C.M. 90).*

### ANNOTATION

|                                       | Pars. |
|---------------------------------------|-------|
| I. IN GENERAL .....                   | 1-5   |
| II. WHO DESIGNATES .....              | 6-8   |
| III. VARIOUS OFFENSES .....           | 9-13b |
| IV. COMMITMENT .....                  | 14-15 |
| V. SEC. 289, FEDERAL PENAL CODE ..... | 16    |

### I. IN GENERAL

1. The term "penitentiary" means a civil prison—as the United States penitentiary, the public prisons and penitentiaries of the several states and territories. The term "state prison" is equivalent to "penitentiary" (12-166). An institution which is in fact a penitentiary cannot be designated a military prison and thereby legalize confinement in it for purely military offenses (12-556). The penitentiary of the Canal Zone may be designated in a proper case (30-1608) (40-399 [6]).\*

1a. Confinement in a Federal correctional institution or reformatory is authorized only for an offense punishable by confinement in a penitentiary. Penitentiary confinement is not authorized for desertion (unless repeated) in time of peace (42-15, 273, 324) (44-280). Penitentiary confinement is not authorized for the offense of misbehavior before the enemy in violation of Article 75 (43-425). Nor is it authorized for unlawfully selling Government military property in violation of A.W. 84 (47-122). Penitentiary confinement is authorized for the following offenses only: Desertion in time of war; repeated desertion in time of peace; mutiny; or an offense of a civil nature made punishable by such confinement for *more than one year* by a Federal statute of general application within the continental United States (except sec. 13, Fed. Penal Code) or by the law of the District of Columbia; or as commutation of a death sentence (M.C.M. 90).

\* The term "penitentiary" includes "Federal reformatory," and thus a Federal reformatory may be designated as the place of confinement only when penitentiary confinement is authorized (49-63).

1b. Penitentiary confinement is not authorized for assault with intent to do bodily harm under Article 93, nor for willful disobedience of a superior officer under Article 64 (42-273) (43-340). But penitentiary confinement is authorized for an assault with intent to do bodily harm with a dangerous weapon (43-427, 428).

1c. Confinement in a Federal reformatory is not authorized for the offense of making disloyal statements in violation of Article 96, unless it is shown that such statements were made with intent to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces (42-361). Penitentiary confinement is authorized for the offense of attempting to create a mutiny in violation of Article 66 (44-10).

1d. Confinement in a Federal reformatory is not authorized for a mail orderly convicted of wrongfully opening a letter prior to its receipt by the addressee in violation of Article 96. To constitute an offense under the postal laws, and hence to justify such confinement, the theft of mail must occur while it is in the custody of the Post Office Department. A military mail orderly is an agent of the addressee, not of the Post Office Department (44-15, 291, 292) (48-85).

2. The effect of this Article is to prohibit confinement in a penitentiary for purely military offenses, except those named in the article, *viz.*, desertion in time of war, repeated desertion in time of peace, and mutiny (12-165, 415) (43-308) (45-384). However, although an offense be charged as a violation of the articles of war and tried by court-martial (*e.g.*, murder under Article 92, larceny under Article 93, fraud against the government under Article 94, or a disorder or neglect under Article 96), if it is a crime or offense punishable under the civil law by penitentiary sentence for more than a year, the confinement may be in a penitentiary (12-166). A civilian internee, if convicted by court-martial of an offense of a civil nature, and sentenced to confinement for more than a year, may be confined in a penitentiary. In cases in which a penitentiary is not authorized or designated, such internee may be confined in the United States Disciplinary Barracks or a military post, station or camp (43-55). The crime of blackmail charged as a violation of Article 96 may be punished by Penitentiary confinement (44-422) (45-425). Penitentiary confinement is not authorized for accepting money by a sergeant from soldiers for passes, nor for accepting gifts of money from soldiers under false pretenses (46-201). Nor is it authorized for the offense of misappropriation of Government military property under Article 94 (47-63). Nor for the misapplication of such property (49-63, 64).

2a. When the period of confinement for the offense involved (*e.g.* larceny of property of the value of \$50) is limited to one year by paragraph 117c, M.C.M., confinement in a penitentiary is not authorized. Not only must the offense be punishable, under some

Federal statute, by imprisonment for *more* than one year, but confinement in excess of one year must be authorized by the Manual for Courts-Martial (42-324) (45-425). Although alleged in one specification, two larcenies not shown to have been committed at the same time and in a single transaction, cannot be aggregated so as to authorize penitentiary confinement (45-463; 47-63, 64).

2b. Escape from confinement in violation of Article 69 is purely a military offense although the escape be from a penitentiary, and such escape is not punishable by penitentiary confinement (43-378). See par. 9 this Annotation.

2c. The offense of self-maiming for the purpose of unfitting oneself for the full performance of military duty, in violation of Article 96, is a purely military offense, and is not punishable by penitentiary confinement (44-516). See Article 96, Anno., par. 7a (47-244, 245).

2d. Failure to suppress a mutiny in violation of Article 67 is not punishable by penitentiary confinement. Although such confinement is authorized for mutiny, Article 42, being a penal statute, must be strictly construed, and mere failure to suppress a mutiny is not mutiny as the term is used in this Article (45-232).

3. The place of confinement should not be designated by the court, but by the reviewing, or confirming authority (M.C.M. 87b). If a military post or prison has been designated, and the prisoner committed, the place cannot be changed to a penitentiary. A change in the place of confinement may be made provided no more severe species of confinement is involved in the transfer (12-565).

4. A sentence to a penitentiary imposed by a military tribunal is not required to follow the statute as to its duration, but in adjudging sentence in a penitentiary case courts-martial should be guided by the statute as indicating a reasonable measure of punishment (12-166), and in time of peace the sentence cannot exceed that fixed by the Federal statute or law of the District of Columbia (Art. 45).

5. A sentence may not be executed in a penitentiary unless it exceeds one year (30-1607) (40-399 [3]) (42-273) (44-58).

## II. WHO DESIGNATES

6. The designation of the place of confinement is the province of the reviewing authority (12-546) (M.C.M. 87b); however, in the absence of the reviewing authority overseas, the sentence having been duly approved by him, but no order published prior to his departure, the order may be published by the War Department including designation of the place of confinement (30-1384) (40-403 [6]). But the order may be published by the reviewing authority notwithstanding he has left the continental limits of the United States (44-230).

6a. When it appears that the accused is a constitutional psychopath,

and the case is one in which penitentiary confinement is authorized, it is recommended that a penitentiary or Federal reformatory be designated in preference to the Disciplinary Barracks (44-280, 281).

7. A military prisoner committed to the U. S. disciplinary barracks cannot legally be confined elsewhere unless in a place which has been designated by the Secretary of War as a branch of the disciplinary barracks (30-1607).

8. If the reviewing authority approves a sentence of more than one year confinement and designates a U. S. penitentiary as the place of execution, and the record is held by the board of review not legally sufficient to support a sentence of more than one year, confinement in a penitentiary is not authorized (30-1607) (40-399 [3]). In such case the reviewing authority must change the place of confinement. In practice the reviewing authority usually does not designate the place of confinement until after the board of review has acted upon the case.

8a. The authority who designates the place of confinement, or higher authority, may change the place of confinement of any prisoner under his jurisdiction. But when the Disciplinary Barracks, or military prison or post has been designated, the place thereafter cannot be changed to a penitentiary under the same sentence (M.C.M. 94).

### III. VARIOUS OFFENSES

9. Confinement in a penitentiary for several offenses one of which is punishable by penitentiary confinement, is authorized only when the various convictions are the result of the same trial. A military prisoner serving a penitentiary sentence who escapes therefrom cannot be sentenced by a military tribunal to a penitentiary for the escape (30-1607, 1609) (40-399 [5]) (43-378).

10. In larceny charged in several specifications, when the value of the articles stolen, as found under any one specification, is not sufficient to make grand larceny, but the aggregate value under all specifications is sufficient, the several larcenies cannot be aggregated if they were separate and distinct transactions, and penitentiary confinement is not authorized (30-1612) (40-399 [2]).

11. In larceny when there is no proof of the value of the stolen articles, but it is shown that they were "usable" and they are articles such that common experience indicates a value more than required for grand larceny, penitentiary confinement is authorized (30-1612) (40-399 [2]).\*

12. While forgery is a penitentiary offense under the Federal penal

\* In the "Hesse jewels case" it was held that "the law is not so rigid or whimsical as to forbid the members of a court-martial, in an exceptional case, from drawing upon common experience in determining that the value of specific property, or a mass of property, of obviously great value exceeds the statutory limit of \$50." (48-188, 189) thus warranting penitentiary confinement (M.C.M. 117c).

code, the forgery of a furlough or pass by a soldier, considered in its military aspect, does not usually indicate the moral turpitude which makes a penitentiary sentence appropriate (30-1610); and a penitentiary sentence is not considered authorized for the forgery by a soldier of an honorable discharge certificate of himself from the military service (30-1610) (40-399 [2]).

13. As to wrongful sale, or application to personal use, of government property, penitentiary confinement cannot be awarded for the reason that section 36 of the Federal Penal Code which denounces these offenses has been held to be unenforceable (30-1611) (40-399 [2]). It has also been held that penitentiary confinement is not authorized for attempt to commit sodomy, nor for soliciting and procuring others to have illicit carnal intercourse (30-1613, 1614) (40-399 [2]), presumably for the reason that these specific offenses are not denounced by any Federal statute. These instances are here cited merely to emphasize the principle that, in order to authorize confinement in a penitentiary, the offense must be one which is punishable, under some Federal law then in force, by imprisonment in a penitentiary for more than a year. The Federal penal laws are subject to change, and each case is to be decided by the laws in force at the time (42-361).

13a. Penitentiary confinement is not authorized for the offense of "committing a lewd and lascivious act upon a minor female child" because this offense is not denounced by any statute of the United States or the District of Columbia (42-213). Penitentiary confinement is not authorized for the offense of attempting to commit a riot in violation of Articles 96 (43-236), nor for committing a riot in violation of Article 89 (43-378).

13b. It is the settled practice in military courts to permit penitentiary confinement in "bad check" cases where the amount involved is more than \$50 (45-282, 283). Penitentiary confinement is not authorized for the wrongful sale or larceny of Government military property of the value of less than \$50, nor for the wrongful sale of other property of any value, because these offenses are not punishable under any Federal statute by confinement for more than one year (47-63, 64).

#### IV. COMMITMENT

14. After the record of proceedings has been held by the reviewing authorities designated in A.W. 50 to be legally sufficient to support the findings and sentence and the convening authority has been so advised, he needs no further authority to commit the prisoner to the penitentiary designated by the convening authority for confinement (30-1384) (40-399 [1]). In practice the War Department keeps officers exercising general court-martial jurisdiction advised as to the Federal prisons which are available for the commitment of military

prisoners, and it is usually necessary to ask the War Department for authority to issue the necessary travel orders on account of the expense involved.

15. A military prisoner who is tried and convicted of an offense punishable by confinement in a penitentiary may not be committed to the penitentiary until he has served the existing sentences to confinement theretofore adjudged against him or until the unexecuted portions thereof have been remitted (30-Sup. 1607) (40-399 [4]).

## V. SECTION 289, FEDERAL PENAL CODE

16. Section 289 of the Federal Penal Code is especially exempted from consideration in the application of this Article so far as confinement in a penitentiary is concerned (30-1607). Said section 289 provides in substance and effect that a violation of a state law committed on a Federal reservation, though not made penal by any law of Congress, may nevertheless be recognized and punished by the appropriate Federal courts (M.L.U.S. 857) (Sec. 289, Fed. Penal Code is now Sec. 13).

• • • •

*ARTICLE 43. DEATH SENTENCE—WHEN LAWFUL; VOTE ON FINDINGS AND SENTENCE. No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken. Conviction of any offense for which the death sentence is not mandatory and any sentence to confinement not in excess of ten years, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote. (As amended by S.S.A. '48, effective Feb. 1, 1949). (See M.C.M. 78d, 80b, 116 & App. 9).*

## ANNOTATION

1. The death sentence may be imposed upon a conviction of several distinct offenses if any one of them is capital, although the others are not (12-165).

2. In imposing the death sentence the court should not designate the time nor place for its execution. Such designation is for the reviewing authority. If the court does so designate, that part of the sentence may be disregarded and a different time and place fixed (12-165).



3. If a court-martial imposes a sentence to confinement for more than ten years by a two-thirds vote only, the reviewing authority may cure the error by approving only so much of the sentence as involves confinement for a period of ten years or less (30-1280) (43-269, 378, 379). The error cannot be cured by remission of the excess confinement because such action would involve, first, the approval of an illegal sentence. But if a death sentence is illegally imposed (i.e. for attempted rape in violation of Article 96) the sentence is void and cannot be acted upon by the reviewing officer. The only remedy is to return the record to the court for proceedings in revision to revoke the void sentence and adjudge a new and legal sentence (43-9, 10).

3a. A dishonorable discharge and total forfeitures legally may be imposed with life imprisonment for a violation of Article 92 (Murder and Rape) (43-425).

4. Failure of the record to show that the sentence was concurred in by the requisite number, as here prescribed, is fatal. The number concurring must be the whole number which includes the requisite fraction, so where the record showed that three-fifths of a court of five members concurred, it was illegal (30-180) (40-400).

4a. It has been held by the U. S. Circuit Court of Appeals, and, in effect, affirmed by the U. S. Supreme Court (*Stout vs. Hancock*, 146 F. 2nd, 741; *certiorari denied by the U. S. Sup. Ct. 30, April 1945*) that, under the 43rd Article, in any case in which the death penalty may be imposed but is not made mandatory (e. g. under Articles 58, 59, 64, 66, 75, 76, 77, 78, 81, 86, and 92) a conviction may be adjudged by a two-thirds vote of the court. A unanimous vote is necessary for conviction only in cases where the death penalty is made mandatory (e.g. Article 82-Spies) (45-128-132). The Article now specifically so provides (M.C.M. 78d, 80b).

5. Upon questions which may be decided by a majority, a tie vote is a negative (12-521).

\* \* \* \*

*ARTICLE 44. OFFICERS—REDUCTION TO RANKS. When a sentence to dismissal may lawfully be adjudged in the case of an officer the sentence may in time of war, under such regulations as the President may prescribe, adjudge in lieu thereof reduction to the grade of private. (As amended by S.S.A. '48, effective Feb. 1, 1949. The old Article 44 has been dropped, and its present provisions are entirely new to our code). (See M.C.M. 116).*

## ANNOTATION

1. This Article applies only when dismissal, without other punishment, would otherwise be adjudged by the court. It should not be

applied unless the accused is within the age limits for induction and otherwise qualified to serve as a soldier (M.C.M. 116c).

\* \* \* \*

*ARTICLE 45. MAXIMUM LIMITS OF PUNISHMENT. Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not exceed such limit or limits as the President may from time to time prescribe: Provided, That in time of peace the period of confinement in a penitentiary shall in no case exceed the maximum period prescribed by the law, which, under article 42 of these articles, permits confinement in a penitentiary, unless in addition to the offense so punishable under such law the accused shall have been convicted at the same time of one or more other offenses. (See M.C.M. 115, 116, 117).*

#### ANNOTATION

|                                 | Pars.  |
|---------------------------------|--------|
| I. IN GENERAL .....             | 1-4b   |
| II. FORM OF PUNISHMENT .....    | 5-5b   |
| III. PREVIOUS CONVICTIONS ..... | 6-9    |
| IV. FORFEITURES .....           | 10-15b |
| V. RESTRICTION TO LIMITS .....  | 16     |
| VI. PLEA OF GUILTY .....        | 17     |
| VII. INCLUDED OFFENSES .....    | 18-20  |

#### I. IN GENERAL

1. A court may not exceed the prescribed limit of punishment although the offense was committed before the present limits were fixed (12-415; 30-2226) (40-402 [1]). See M.C.M. 117 for maximum limits under present regulations. The prescribed maximum punishments, being applicable to enlisted men of the Army, are also applicable to enlisted prisoners of war; and, though not requisite in point of law, should be applied to sentences imposed upon civilian internees (43-54). They also apply to officers and warrant officers as to confinement (M.C.M. 116c).

1a. In court-martial procedure the value of the subject matter determines the grade of offenses involving unlawful dominion over, or disposition of, Government or private property in violation of Articles 83, 84, 93, 94 and 96, and it is essential that the value be expressly alleged and proved in order to support a sentence greater than the minimum (48-93, 94).

1b. When the offense charged is not listed in the table of maxi-

imum punishments (M.C.M. 117c), is not analogous to any offense so listed, and there is no Federal statute applicable, the offender may be punished at the discretion of the court (45-134, 135). When the offense is not listed in the table of maximum punishments, or included in, or closely related to, an offense therein listed, then if the offense is denounced by a section of the U. S. Code of general application, the maximum penalty prescribed by the U. S. Code for that offense must control (47-242, 243).

2. When the prescribed limit is applicable only in time of peace its application relates to the time when the offense was committed and not to the time of trial (30-1390) (40-402 [1]).

3. Sentences of officers to loss of rank and promotion are not authorized (except under Article 44); but an officer may be *suspended* from rank, command, or duty. Suspension from rank includes suspension from command, but does not affect his right to promotion, but does render him ineligible to sit as a member of a court-martial, court of inquiry, or military board, and deprives him of privileges depending upon rank. Suspension from command merely deprives the officer of authority to exercise military command or give orders to his juniors. It does not affect his right to promotion. Suspension from duty is analogous to suspension from command (M.C.M. 116h).

4. In determining the limit of punishment for desertion with reference to the manner of return to military control, the rule is that if the accused initiates his return by surrendering himself to either the civil or military authorities the desertion is terminated by surrender, but if he be first apprehended by the civil authorities for a civil offense and discloses his identity as a soldier to escape punishment therefor, his return to military control is regarded as terminated by apprehension (30-Sup. 1510) (40-416 [15]).

4a. The legality of a sentence to confinement at hard labor "for the duration of the war plus six months" is extremely doubtful. Sentences to confinement should be for a definite term expressed in days, months, or years (43-141).

4b. Two or more sentences of hard labor without confinement, the initial sentence remaining in whole or in part unsatisfied, are to be executed consecutively in the order of their effective dates (44-340). Where a prisoner is serving consecutive sentences, his credit for good behavior is not to be deducted from each term, but his imprisonment is considered as a single term for the aggregate of the several sentences (46-202).

## II. FORM OF PUNISHMENT

5. While a specific form of punishment may be recommended, courts-martial cannot be ordered to adopt a particular form of punish-

ment in any case or class of cases in which the form of punishment is discretionary with the court (12-542) (40-Sup. 395 [55]). (See Art. 88).

5a. The terms and wording of a reprimand or admonition are not fixed by the court (M.C.M. 116e), but by the reviewing authority.

5b. Hard labor, though not included in the sentence, may be required under a sentence to imprisonment (see Art. 37) and any person subject to trial by court-martial may be sentenced to confinement at hard labor in a proper case; but an officer should not be so sentenced unless the sentence also includes dismissal, nor a warrant officer unless the sentence also includes dishonorable discharge. Confinement "without hard labor" should not be adjudged. Hard labor without confinement is proper. It is to be performed in addition to regular duties (M.C.M. 116i).

### III. PREVIOUS CONVICTIONS (See M.C.M. 79c)

6. Any number of previous convictions may be shown (within the prescribed time limit), but the punishing power of the court, as restricted by the articles of war, cannot thereby be increased (12-541), except that in so-called "5 previous conviction cases", if the court adjudges dishonorable discharge and total forfeitures, it may, in its discretion, add confinement at hard labor for three months or less (30-Sup. 1463 a) (40-454 [40]).

6a. "Previous convictions" in the case of a warrant officer or a flight officer are limited to those for offenses committed during his status as such warrant or flight officer, and within three years (45-463).

7. Previous convictions in a civil court are not admissible. A previous conviction means one approved by competent authority, and its date is the date of such approval (12-541). But in computing the period for admissibility of previous convictions, unauthorized absences, as evidenced by previous convictions shown, are excluded (M.C.M. 79c), the purpose being to consider all convictions for offences committed within the preceding one year during which the accused was present for duty (43-141). Punishments under Article 104 (Company Punishments) are not previous convictions and evidence thereof may not be considered unless introduced by the accused, and then only when such punishment was for an offense connected with the one for which accused is on trial (43-183, 184). Conviction of several offenses in a single trial, for all of which only one sentence is imposed, counts as only one "previous conviction" (43-379). A garrison prisoner serving a sentence of confinement at hard labor is not in a status of "unauthorized absence" within the meaning of that term as used in M.C.M. 79c, and time thus spent in garrison confinement should not be excluded in computing the one year period (44-96, 97, 186).

8. If accused is acquitted, evidence of previous convictions should not be received (12-542).

9. A conviction of an offense committed subsequently to the one on trial is not a "previous conviction" within the purview of M.C.M. Sec. B, 117c; and a conviction of a minor offense committed at about the same time as the one on trial, and which should have been included in the charges under trial, should not be counted as a "previous conviction." The date of commission of a previous offense need not be shown if no objection is made by the defense and there is nothing to show that it was committed more than a year prior to the present offense (30-Sup. 1387) (40-402 [5]). The improper introduction of previous convictions without objection is not necessarily fatal error, but since they may have influenced the court in fixing punishment it should be brought to the attention of the reviewing authority for such action with respect to the sentence as he deems advisable (44-186).

#### IV. FORFEITURES (See M.C.M. 117c)

10. Forfeitures must be stated explicitly and with certainty. A sentence imposing a forfeiture of all pay and allowances due or to become due, without a dishonorable discharge, is invalid in that it attempts to impose forfeitures for an indefinite period; so also a sentence to "confinement at hard labor for six months and forfeiture of two-thirds of the soldier's pay per month" is invalid so far as the forfeiture is concerned, as the period during which the forfeitures are to run is not specified (30-1388) (40-402 [9]).

10a. A sentence of forfeiture of pay does not create a general liability on the accused, but merely deprives him of his right to receive a certain amount of the pay to which he otherwise would have been entitled in his particular military status. When that status terminates there remains nothing upon which the forfeiture may operate. This takes place in case of the discharge of a soldier or warrant officer to accept a commission, even though his military service is uninterrupted (43-467) (45-133).

10b. Pay for September delivered to a soldier on October 18 while he was in confinement awaiting trial, and left with the acting first sergeant for safe-keeping, was held not forfeited by his sentence by court-martial on November 19 to dishonorable discharge, total forfeitures and imprisonment (44-125). A forfeiture, fine or detention becomes legally effective on the date the sentence adjudging it is promulgated (M.C.M. 116g).\*

10c. Courts-martial have authority to impose fines instead of for-

\* The approved form of sentence for total forfeitures is—"To forfeit all pay and allowances to become due after the date of the order directing execution of the sentence" (M.C.M. App. 9, p. 364). There is no authority either in A.W. 16 or the implementing provisions of the Manual for Courts-Martial (M.C.M. 116g) which authorizes the forfeiture of pay and allowances which had accrued at the date of the order executing the sentence (49-4).

feitures not only in those instances in which fines are expressly authorized (Art. 80—Dealing in captured property and Art. 94—Frauds against the Government) but under all the Articles which authorize “such punishment as a court-martial may direct”, of which Article 96 is one (44-281). See par. 10a, this annotation, as to effect of a sentence of forfeiture. See also Article 41, Anno., par. 6. Under the present Table of Maximum Punishments (M.C.M. 117c, sec. B) a fine may be adjudged, in lieu of forfeitures, for any offense listed in the table for which dishonorable discharge is authorized, provided a dishonorable discharge is also adjudged in the case.

11. Forfeitures without a dishonorable discharge at a rate greater than two-thirds of the soldier's pay per month are prohibited by the executive order limiting punishments (M.C.M. 117), and a lump sum forfeiture, without any specification as to the rate per month and the number of months over which it is to extend, cannot exceed two-thirds of the soldier's pay for one month (30-1392, Sup. 1388) (40-402 [10]); and such a sentence cannot be “corrected” by proceedings in revision (30-Sup. 1394) (40-397 [6]) (42-16).

11a. The limitation on punishments prescribed by M.C.M. 117, and the jurisdictional limitations on special and summary courts-martial (Articles 13 and 14) are applicable to civilians as well as soldiers. Accordingly a sentence to total forfeitures imposed upon a civilian by a special Court-Martial should be reduced to not more than two-thirds of his pay per month for six months (45-7).

12. Without a sentence of dishonorable discharge, forfeitures may not exceed two-thirds of the soldier's pay per month for six months, and if a soldier be sentenced to dishonorable discharge, total forfeitures, and a term of confinement, and, after a portion of the confinement has been served, the dishonorable discharge, which had been suspended until his release from confinement, is remitted, collection of more than two-thirds of his pay per month after the remission of the dishonorable discharge is illegal (30-1874) (40-402 [10]). Forfeiture of allowances cannot be imposed without a dishonorable discharge (30-Sup. 1388) (40-402 [8]).

13. Pay cannot be forfeited by implication. A sentence to confinement for two months “and forfeit \$14 of his pay for a like period” may not be interpreted to forfeit \$14 pay per month for two months (30-1874) (40-402 [9]).

14. In determining the maximum amount of a sentence of partial forfeiture the soldier's “base pay plus pay for length of service” only will be considered (30-1874) (40-402 [8]). Under a ruling of the Comptroller General a soldier outside the continental limits of the United States is not entitled to “foreign service pay” when he is removed from duty by arrest or confinement on account of an offense of which he is convicted. Accordingly in determining the maximum

limits of forfeiture (M.C.M. 117c) when a court-martial adjudges confinement and partial forfeitures, foreign service pay may not properly be considered as an element of pay subject to forfeiture. The pay which may be forfeited by courts-martial is governed by the actual pay status of the accused when the forfeiture is imposed (45-6, 7).

15. The term "base pay" does not include extra pay for any special qualifications or for special duties performed, such as flying pay or pay incident to qualification as a combat infantryman. Unless dishonorable or bad conduct discharge is adjudged the monthly contribution of the soldier to "family allowance" is also excluded in computing the amount of pay subject to forfeiture (M.C.M. 117c).

15a. An Army mail clerk misappropriated postal funds. He was convicted by court-martial and sentenced to dishonorable discharge and total forfeitures. Held, that under R.S. 1776 (M.L.U.S. 1516) the Post Office Department was entitled to reimbursement by a stoppage against the soldier's pay, and that such stoppage takes precedence over the court martial forfeiture (43-210). But when a soldier was convicted of embezzlement of post exchange funds and sentenced to forfeit \$33 per month for six months, it was held that the forfeiture may not be made available to apply in partial reimbursement of the surety company which had paid the shortage. Fines and forfeitures imposed by courts-martial accrue to the United States, and cannot be so imposed for the benefit of any individual or corporation (44-193).

15b. The wrongfully taking of mail by an Army mail orderly, after it has left the custody of the Post Office Department, is not "larceny from the U. S. mail" (44-291, 292). It is punishable only as simple embezzlement or larceny, and when the value is \$20 or less, the limit is dishonorable discharge, total forfeitures, and confinement at hard labor for six months (48-85), but not in a penitentiary. See Art. 42, Annotation, Par. 1d.

## V. RESTRICTION TO LIMITS

16. Restriction to limits cannot in any case exceed three months. This applies to all persons subject to military law regardless of rank. Restriction to limits does not operate to exempt the person on whom it is imposed from any military duty (30-1393) (40-402 [12]) (M.C.M. 116f).

## VI. PLEA OF GUILTY

17. Under a plea of guilty, no evidence being introduced, the sentence may not exceed that stated as the maximum in the explanation to the accused by the court of the effect of his plea although the explanation was erroneous (30-1443) (40-378 [2]). See Article 37, Annotation, par. 76.

## VII. INCLUDED OFFENSES

18. When an accused is convicted of two offenses under separate specifications, one of which is included in the other, no greater sentence can be imposed for both than that authorized for the inclusive offense (30-1443); but where the offenses are separate and distinct, though both involved in the same transaction, punishment should be imposed only with reference to the act in its most important aspect (40-402 [2]) (42-16) (43-142) (45-177) (46-202, 203) (47-10, 11, 291). An accused was convicted of negligently suffering a Government airplane to be destroyed under Article 83, manslaughter under Article 93, and violation of flying orders under Article 96, and sentenced to dismissal. All the charges involved the same transaction, but as there was no assessment of multiple punishment the accused was not prejudiced thereby (43-271). It is not error to charge the same offense under different Articles when one of the charges is based on its military aspect; but punishment should be imposed only for the offense in its most serious aspect (44-10, 418, 419). A medical officer was convicted of offering to obtain a discharge for a soldier under his care for a sum of money in violation of Article 96, and of receiving money from the same soldier for the same purpose in violation of Articles 95 and 96. A sentence of dismissal and confinement for three years was approved. Although Article 95 does not permit any punishment in addition to dismissal, the convictions under Article 96 authorized the additional penalty. The offense being tainted with corruption and moral turpitude, the charges under Article 96 presented the more important aspect of the case. This is distinguishable from cases where it has been held that when accused is charged under Article 95 and convicted of a lesser included offense under Article 96 no greater punishment than dismissal could be given for the lesser included offense (44-237). An accused was convicted of wrongful selling 40 Government sheets, value \$52.40, between November 1, 1946, and December 31, 1946 in violation of Article 94. The evidence showed that he sold 32 sheets in November and 10 sheets in December, and that the two transactions were separate and distinct; and although charged as one offense, the two separate sales constituted two distinct offenses and could not be aggregated in value in determining the limit of sentence. Held that the sentence should be based on the more serious of the two offenses, *viz.* the November sale of 32 sheets (48-24-26).

18a. The offense of being found drunk on duty as a member of a special guard in violation of Article 96 (General Article), not being charged as the offense of a sentinel (Article 86) is most closely related to that of being drunk on duty as a guard in violation of Article 85, and the maximum punishment for the latter offense is applicable. The offense of leaving post as a special guard before being relieved



under Article 96 is most closely related to absence without leave from guard under Article 61 (43-427, 428).

19. In larceny, where only one trespass and felonious removal of goods is shown, but the charges are laid in several specifications on account of diverse ownership of the stolen articles, the sentence is limited by the total value of all the stolen property. In other words, it is to be treated as one larceny. The same is true where several larcenies are charged on different dates from the same owner, but the evidence indicates that all were committed at the same time (30-Sup. 15722) (49-13) (40-451 [47]). Likewise in the case of multiple robberies committed at the same time, they should be treated as one offense for the purpose of fixing punishment (43-187). In the larceny of a check its value, for the purpose of fixing the limit of punishment, is the amount for which it is drawn (44-287).

20. In a case involving an offense of a civil nature for which no limitation of punishment is fixed by executive order, no greater period of confinement should be imposed than that authorized by the civil statute (40-402 [14]) (44-101, 102, 473) (45-56, 235). But an attempt (i.e. to commit sodomy) which is not separately listed in the table of maximum punishments is subject only to the same limit of punishment as is the offense attempted. The punishment for such an attempt therefore is not restricted to that prescribed by the civil statute (43-61). But when a soldier was convicted of self-maiming with intent to avoid hazardous duty under Article 96, for which no limit of punishment is prescribed, a sentence of dishonorable discharge and twenty years' confinement was held legal although the civil statute (District of Columbia) fixes the limit of punishment for self-maiming at ten years confinement. The fact that the offense was committed "with intent to avoid hazardous duty" (i.e. combat duty) added an element which is not included in the civil offense (43-467, 468). A State statute does not control the maximum punishment that may be imposed (45-14).

## CHAPTER VIII

### COURTS-MARTIAL—ACTION ON CHARGES

*ARTICLE 46. CHARGES; ACTION UPON. a. SIGNATURE; OATH. Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief.*

*b. INVESTIGATION. No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general courts-martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation they shall be accompanied by a statement of the substance of the testimony taken on both sides.*

*c. FORWARDING CHARGES; DELAYS; SERVICE OF CHARGES. When a person is held for trial by general court-martial, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the ac-*

*cused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.* (As amended by S.S.A. '48, Effective Feb. 1, 1949) (See M.C.M. Chaps. VI and VII).

(Note: The present language of this Article has been brought largely from Article 70, except the provision in paragraph "b" for the right of accused to counsel at the investigation of the charges, which is new. The applicable annotations have likewise been transferred from the old Article 70. The former Article 46 has been merged in the new Article 47.)

### ANNOTATION

|                                    | Pars. |
|------------------------------------|-------|
| I. WHO MAY PREFER .....            | 1-5   |
| II. FORM .....                     | 6-9b  |
| III. OATH TO .....                 | 10    |
| IV. INVESTIGATION .....            | 11-15 |
| V. SERVICE ON ACCUSED .....        | 16-21 |
| VI. ACTION UNDER ARTICLE 104 ..... | 22    |

#### I. WHO MAY PREFER (See M.C.M. 25.)

1. Charges may originate with a civilian but must be signed by a person subject to military law (12-482). Any person so subject may prefer charges although he be under charges himself or in arrest or confinement (M.C.M. 25).

2. An officer in arrest may prefer charges (12-483). A warrant officer may prefer charges (30-101) (40-428 [7]).

3. Charges cannot be signed "by order of" the commanding or other officer (12-487); and a "blanket order" directing the trial of all soldiers who commit certain offenses is in conflict with this Article, and is illegal and of no effect (30-1270) (40-428 [1]).

4. The officer preferring the charges should sign his full name and his rank and status to minimize doubtful identity (30-2228).

5. An objection that charges are not signed should be raised at the arraignment. By pleading the general issue the objection is waived (12-504). If, however, it should develop, in such case, that the accuser sat as a member of the court, the proceedings would be void (Article 4, General Courts-Martial).

#### II. FORM (See M.C.M. Apps. 3 & 4.)

6. All pending charges should, if practicable, be consolidated and made the subject of a single trial. They may be unlimited in number and as various as the jurisdiction of the court will permit (12-494). But see Art. 70, Anno., as to "saving up" charges.

6a. Unnecessary multiplication of charges based upon the same act

is improper (M.C.M. 27; 49-66). As a general rule there should be no duplication when one offense is included in the other. For example, charges of robbery and assault with intent to commit a felony, based upon the same act, would be improper because the assault was included in the robbery. The charge should be robbery, and the court can substitute the lesser offense if the evidence so warrants. But when the wrongful act, when viewed in its different aspects, constitutes two separate and distinct offenses, as a felonious assault in violation of Article 93 (Various crimes) and assault upon his superior officer under Article 64, it is not a duplication to charge the accused, under the respective articles, with both offenses. Charges of manslaughter in violation of Article 93 and reckless driving of an automobile thereby causing death would not be improper, although both offenses are referable to the same transaction (40-428 [5]). The same act of sodomy may be charged under both Articles 93 and 96, the first being based on the civil, and the second on the military aspect of the crime, but punishment should be imposed only for the offense in its most important aspect (44-10). See Article 45, Anno., par. 18. Mutiny and rioting, based upon the same acts, do not constitute a multiplication of charges as they are separate and distinct offenses (44-143). A single act of disobedience of a lawful command should not be made the basis of charges under Articles 64 (Disobedience) and 66 (Mutiny), but such multiplication of charges is not prejudicial when the sentence imposed for both offenses is within the limit for either one (44-234). Charges of Larceny of Government property under Article 94 and attempted sale of the same property under Article 96 are separate offenses and it is not an unreasonable multiplication to charge both (44-288). Identical acts may be charged under Article 95 and any other applicable Article (44-345). And when an individual act of disobedience (e.g. refusal to keep quiet) precedes a mutinous act (e.g. leaving company area in violation of orders) the two offenses are sufficiently distinct to warrant charging both (45-53, 54). Conspiracy to commit an offense and the offense itself when committed are separate and distinct offenses, and their allegation in separate specifications is not a violation of the rule against multiplication of charges (46-340).\*

6b. Separate specifications in a charge of robbery of two victims do not constitute, legally, an improper multiplication of charges, but when both victims were robbed at the same time and by use of the same act of force, the two robberies constitute a single transaction and the sentence must be limited to the maximum for a single offense (43-187). The same rule applies to the larceny of property

\* Wilful disobedience of an order in violation of A.W. 64 and breach of arrest in violation of A.W. 69, both charges being predicated upon the order placing the accused in arrest, was held to be an improper multiplication of charges, and conviction under A.W. 69 only was approved (49-66).

of two or more individuals committed in a single transaction (48-38, 39).

6c. A single specification charging a series of wrongful takings at approximately regular intervals over a period of nine months, is not duplicitous when the accused is not misled and presents defenses to all the matters alleged. The rule against duplicity does not necessarily apply when there is a series of offenses of the same nature constituting a continuing course of conduct (45-232, 233). See Art. 37, Anno., pars. 30-32. Duplicity in a specification charging both common-law and statutory rape, is not a fatal error, in the absence of objection directed against that imperfection. The allegation that the victim was "under sixteen years of age" may be disregarded as surplusage (46-336).

7. The same act may be charged in two or more forms if it is doubtful which can be proved, and the prosecution cannot be required to "elect" which charge it will proceed under (12-504, 505). But as a general rule it is improper to add charges for minor offenses which are incident to, or included in, the main offense (12-487) (44-235, 236). It is not error for the court to deny a motion by defense to add a charge and specification alleging a lesser offense, because the appointing authority has exclusive and plenary power to designate who shall be tried and for what offenses (44-191). Two separate and distinct intents, viz. to avoid hazardous duty and shirk important service, may be alleged in one specification for desertion. The prosecution may prove either or both intents alleged (44-336).

8. Charges consist of two parts—the "charge" in which the offense is designated as a violation of a certain Article of War, and the "specification" or "specifications" in which are set forth the facts supposed to constitute the offense charged. Double pleading, *i.e.* alleging two or more separate offenses in one specification, is not proper (12-482), and pleading in the alternative, such as "did sell or through neglect lose," is improper (12-487). The essential elements are: (1) That the charge be laid under the proper Article, and (2) that the specification should set forth facts sufficient to constitute the offense charged (12-482, 483, 484). Under a charge of murder by suffocation "with his hands or other means forcefully employed." Held: Although alternative pleading is improper, it is immaterial when the alternatives do not constitute separate and distinct offenses, are not inconsistent, and do not render the charge uncertain (44-11).

8a. Under a specification for being drunk and disorderly in uniform in a public place in violation of Article 96, the court excepted the words "was drunk and disorderly in uniform" and substituted the words "did conduct himself in a manner to bring discredit upon the military service." The substituted allegation was merely a conclusion as to the affect of undescribed conduct. By the "exception"

the court acquitted the accused of the acts specified and the substitution failed to supply any allegation of specific facts and circumstances which would constitute an offense. Moreover the court could not, by exceptions and substitutions, convict the accused of acts not included in the original specification. Conviction disapproved (43-187). When an act sought to be charged is not *per se* an offense, words importing criminality (such as "wrongfully," "unlawfully" or "without authority") must be included in the specification to make the act an offense. The specification as drawn, or as finally affected by the action of the court or of the reviewing authority, must allege such facts as to constitute an offense in violation of an Article of War. Such allegations, if omitted, may not be supplied by proof (47-177).\*

g. Joint charges are proper when the offense is susceptible to combined action, and was committed by two or more persons acting in concert. The mere fact that two or more persons committed the same offense at the same time and place does not necessarily make it a joint offense (12-484, 485) (43-339). When the accused were arraigned separately but tried jointly, with their consent, on identical charges and specifications for the same offense committed at the same time and place, it was suggested that joint charges would have been preferable (43-381) (44-143). In a homicide caused by the negligent operation of an automobile the driver and the person in charge of the vehicle may be jointly charged, no element of intent being involved (44-63).

ga. In joint charges care must be taken to charge all the persons intended to be accused and tried. Under a specification that "X did, in conjunction with Y, with intent to commit a felony, viz. rape, commit an assault upon" a certain named person, it was held that the charge was against X only, and the conviction of Y was disapproved. In order to charge Y as a joint offender the specification should have alleged that "X and Y, acting jointly, and in pursuance of a common intent, did commit an assault," etc., or language of similar import containing direct and specific allegations against both offenders (44-59-61). Two persons cannot be jointly guilty of committing a single rape, but, as all those aiding and abetting the crime are guilty as principals, all may be charged jointly, or those aiding and abetting only may be charged separately (44-61, 62). See Art. 93, Anno., par. 19b.

gb. Two accused were convicted of wrongfully taking and using an

\* An accused was charged with an assault with intent to do bodily harm with a dangerous weapon, to wit, a knife. The court convicted him except the words "to wit, a knife," without any substitutive words. The evidence showed two assaults, one with a knife and the other with a pistol. Held, that by its action the court, in effect, acquitted the accused of the assault with a knife and convicted him of an assault with a dangerous weapon not specified, but evidently having in mind the pistol, thus changing the identity of the offense charged with that of which he was convicted, which action was illegal and could not be sustained (48-186, 187, 189). Under a charge of willful disobedience of a specified order in violation of A.W. 64, a conviction, by exceptions and substitutions, of failing to obey an unspecified order in violation of A.W. 96 cannot stand. Neither the court nor the reviewing officer is authorized to find an accused guilty of an offense which is, in any way, open to an interpretation that it may include acts with which he was not confronted upon his arraignment (40-10, 11).

automobile without the consent of the owner, in violation of Article 96. The specification alleged that X did, in conjunction with Y, wrongfully take and use, etc. Each accused pleaded guilty. The evidence consisted of the sworn statements of accused given to the investigating officer and received without objection. These statements tended to show that both accused participated in the offense. No question was raised at the trial as to the validity of the specification. Held: The conviction of Y could not be sustained because the specification contained no allegation that he had committed any offense. It was alleged merely, in effect, that X, while associated with Y, took and used the automobile. The defect was not waived by Y's plea of guilty, nor by his failure to raise the question during trial. It was an organic defect which nullified the whole prosecution against Y. (44-235). See also par. 9a, this Annotation.

### III. OATH TO

10. The requirement that charges be sworn to may be waived by the accused, either explicitly or by failure to object (30-Sup. 1267); and, in the absence of objection, the fact that the charges were sworn to before an officer not competent to administer oaths does not invalidate the proceedings (30-1267) (40-428 [7]). The accuser need not swear to the charges when he believes the accused innocent but deems trial advisable for the protection of the accused, or in the interest of the service; but an accused should not be tried upon unsworn charges if he objects (M.C.M. 31).

### IV. INVESTIGATION (See M.C.M. 35.)

11. The investigation required by this Article should be made by an officer other than the signer of the charges (30-1263). It is procedural in nature and failure to comply literally with all the requirements of the regulations (M.C.M. 35) will not defeat the jurisdiction of the court (30-Sup. 1263) (40-428 [2]) (46-335, 336). But there must be a substantial compliance with the requirements of this Article, and when the record shows that no investigation of the charges was made prior to trial, the proceedings are void (49-67) (40-428 [1]).

12. It is not necessary, in the investigation, that the accused be confronted with all the witnesses who are to testify against him. It is sufficient if he be advised as to the nature of their testimony and if he does not desire to cross-examine them they need not be called by the investigating officer (40-428 [3]). The competency of a witness is not affected by failure to advise the defense that such witness would be called, or by the fact that he did not appear before the investigating officer. However, the defense would be entitled to a continuance to meet any material element of surprise involved (43-9).

13. A special report of an inspector with attached statements of witnesses need not be shown to the accused prior to the investigation

of the charges; but at the investigation the accused should be advised, so far as practicable, of all evidence against him, and if such inspector's report contains evidentiary matter not otherwise disclosed, it should be shown accused at the investigation (30-1264, 1266) (40-428 [3]).

14. A reinvestigation is not required where the original charges are in improper form. They may be corrected and referred to trial without further investigation provided the identity of the offense is not materially changed (30-Sup. 1265 a) (40-428 [1]).

14a A change in the charge against an officer from Article 96 (General Article) to Article 95 (Conduct Unbecoming) after the investigation, the specifications remaining the same, does not necessitate a second investigation (43-308). (But see M.C.M. 34d).

15. The investigating officer may testify on the trial to a voluntary statement made to him by the accused during the investigation (30-1287) (40-395 [6]). (But see Art. 37, Annotation, par. 53).

#### V. SERVICE ON ACCUSED

16. The requirement for delivery of a copy of the charges to the accused within eight days is met if a true copy of the existing charges and specifications is so delivered, though the list of witnesses is not appended thereto, and the charges are imperfect in form and intended to be corrected (12-152, 489). (But see Article 20, Annotation, par. 2).

17. Failure to serve a copy of the charges upon accused is not prejudicial error if he pleads guilty (30-1367) (40-428 [6]), and failure, upon arraignment, to take notice of a variance between the specifications to which accused is required to plead and the copy served upon him is a waiver of such objection (12-503).

18. Neither the trial judge advocate nor the court has the power to make substantial amendments to the specifications without directions from the convening authority (30-1405) (40-428 [9]); and after the accused has been arraigned upon certain charges and specifications material amendments thereof cannot be made (12-490) and new charges cannot be added (12-503) (46-279, 280). But the court may during trial permit an appropriate amendment of a defective specification which originally was sufficient to apprise the accused fairly of the offense intended to be charged, provided it clearly appears that accused has not been misled and that a continuance is unnecessary for the protection of his substantial rights. But an amendment increasing the *quantity* or changing the *quality* of the offense charged is unauthorized (44-286, 287). See Art. 93, Anno., par. 23.

19. A specification should be set forth in simple and concise language. Its sufficiency will not be measured by the strict rules ap-



plicable to civil indictments, but it must contain, by direct averment or by reasonable implication, all elements of the offense sought to be charged. It may not be amended at the trial to allege an offense wholly different and not included in the original specification. It should contain allegations as to the date and place of the offense, persons involved, and other facts necessary to identify the specific offense charged so the accused can prepare his defense and protect himself from double jeopardy. When there is a series of wrongful acts committed in such continuity as to constitute a single crime, all may be merged in one specification (48-185, 186) (40-428 [8] [14]).

20. It is not an objection to the competency of a witness that his name is not on the list of witnesses appended to charges (12-524) (43-9).

21. In time of war immediate trial is not prohibited and service of charges upon the accused five days or more before trial is not required (30-1411) (40-428 [15]). This does not mean that in time of war the accused may be deprived of his right to prepare his defense, nor that he is limited to five days. The war-time power to bring an accused to immediate trial, implied in the last sentence of the Article, should be exercised with great care and only when the rights of the accused are not materially prejudiced thereby (43-138) (45-173, 174). When charges were preferred against an officer, investigated, served on the accused and, brought to trial before a court sitting 100 miles from accused's station, all within three days, and the accused's request for a two-hour postponement was refused by the court, it was held to be an abuse of discretion and a conviction was set aside with the comment, in effect, that an accused must be allowed a reasonable time to advise with counsel and prepare his defense even in time of war, and that to deny this right is to deny a fair trial (44-95) (45-273). (See Art. 20, Annotation, par. 2a).

## VI. ACTION UNDER ARTICLE 104 (See M.C.M. Chap. XXVII)

22. Before recommending court-martial action, a commanding officer should resort to his powers under Article 104 (Disciplinary Powers of Commanding Officers) in every case where punishment is deemed necessary, and that Article applies, unless it is clear that punishment under that Article would not meet the ends of justice and discipline. Every officer through whose hands proposed court-martial charges pass prior to their reference to a court for trial (see M.C.M. Chap. VII) should eliminate therefrom charges which, in his opinion, may properly be disposed of under Article 104, to the end that any tendency of subordinate commanders to resort unnecessarily to court-martial procedure for punishment of offenders for minor offenses should be restrained (M.C.M. 118).

## CHAPTER IX

### COURTS-MARTIAL—ACTION ON PROCEEDINGS

**ARTICLE 47. ACTION BY CONVENING AUTHORITY.** a. **ASSIGNMENT OF JUDGE ADVOCATES; CHANNELS OF COMMUNICATION.** *All members of the Judge Advocate General's Department will be assigned as prescribed by The Judge Advocate General after appropriate consultations with commanders on whose staffs they may serve; and The Judge Advocate General or senior members of his staff will make frequent inspections in the field in supervision of the administration of military justice. Convening authorities will at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice; and the staff judge advocate of any command is authorized to communicate directly with the staff judge advocate of a superior or subordinate command, or with The Judge Advocate General.*

b. **REFERENCE FOR TRIAL.** *Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in the preceding article, that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation.*

c. **ACTION ON RECORD OF TRIAL.** *Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.*

d. **APPROVAL.** *No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: Provided, That no sentence of a special court-martial*

*including a bad-conduct discharge shall be carried into execution until in addition to the approval of the convening authority the same shall have been approved by an officer authorized to appoint a general court-martial.*

**e. WHO MAY EXERCISE.** *Action by the convening authority may be taken by an officer commanding for the time being, by a successor in command, or by any officer exercising general court-martial jurisdiction.*

**f. POWERS INCIDENT TO POWER TO APPROVE.** *The power to approve the sentence of a court-martial shall include—*

*(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;*

*(2) the power to approve or disapprove the whole or any part of the sentence; and*

*(3) the power to remand a case for rehearing under the provisions of article 52. (As amended by S.S.A. '48, effective Feb. 1, 1949). (See M.C.M. Chap. XVIII).*

*(Note: This amended Article is a consolidation of the former Articles 46 and 47, with some material additions. Paragraph "a" is new. Paragraph "b" is taken in part from old Article 70; the second phrase is new. Paragraph "c" is from former Article 46 with added provisions. Paragraph "d" is from former Article 46 with an added provision relating to special court-martial proceedings in certain cases. Paragraph "e" extends the reviewing authority to include "any officer exercising general court-martial jurisdiction.")*

## ANNOTATION

|  | Pars.  |
|--|--------|
| I. ASSIGNMENT OF JUDGE ADVOCATES, ETC. . . | 1      |
| II. REFERENCE FOR TRIAL . . . . .          | 2- 5   |
| III. ACTION ON RECORD OF TRIAL             |        |
| Reviewing Authority . . . . .              | 6- 9   |
| Reference to Staff Judge Advocate . .      | 10-11a |
| Form of Action . . . . .                   | 12-13  |
| Promulgation Order . . . . .               | 14-18  |
| Loss or Destruction of Record . . . .      | 19     |
| IV. POWERS INCIDENT TO POWER TO APPROVE    |        |
| Lesser Included Offenses . . . . .         | 20-20a |
| Remission of Portion of Sentence . .       | 21-25  |
| Rehearing . . . . .                        | 26     |
| Cannot Correct Record or Increase          |        |
| Punishment . . . . .                       | 27-34  |
| Disapproval . . . . .                      | 35-39a |
| Finality of Action . . . . .               | 40-42  |

## I. ASSIGNMENT OF JUDGE ADVOCATES, ETC.

1. Paragraph "a" of this Article, as amended, contains provisions never before included in the Articles of War. In effect it gives the Judge Advocate General direct "supervision of the administration of military justice" in all branches of the Army wherever located, and provides him with necessary authority as to the assignment of, and communication with, the officers of his Department to enable him to exercise such supervisory control.

## II. REFERENCE FOR TRIAL

2. When a general court-martial has been convened by a corps area or department commander to sit at a certain post, the post commander is not empowered to refer cases to it for trial. He must forward them to the convening authority (12-268).

3. It is within the discretion of the officer exercising general court-martial jurisdiction to decline to order the charges to trial, and his decision is final (12-153). He may withdraw any charge or specification which he has referred to the court for trial at any time before the court has reached a finding thereon (M.C.M. 5a).

4. Before directing trial the charges must be referred by the officer exercising general court-martial jurisdiction to *his* staff judge advocate for consideration and advice. A report made by the staff judge advocate of the post at which the case arose, the post commander not having general court-martial jurisdiction, is not sufficient (42-215).

5. When the indorsement on the charge sheet referring the case to the court for trial was prepared but not signed, but on the margin of the staff judge advocate's recommendation for trial was the notation "O.K." followed by the initials of the convening authority, it was held a harmless procedural error and that the trial actually was directed by proper authority (43-236).

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## III. ACTION ON RECORD OF TRIAL

*Reviewing Authority*  
(See M.C.M. 87)

6. The "reviewing authority" is the officer whose province it is to take action upon the proceedings after the trial is terminated. It is the commander who convened the court or his successor in command. The power cannot be delegated to a staff or other officer (12-554, 579; 30-1377, 1381) (40-403 [1]).

7. The "officer commanding for the time being" is the officer who

has succeeded to the command of the officer who convened the court either because of his temporary absence or his regular relief and assignment to other duty; or when the command has been discontinued and merged in a larger command. Thus when a separate brigade has been merged in a division the commander of the division becomes the "officer commanding for the time being" (12-174, 175, 554). His rank is immaterial so long as he has succeeded to the command (12-175). When the command in which the court was appointed no longer has general court-martial jurisdiction (e.g. has been placed under command of a Naval officer) the commanding officer next above the appointing authority in the chain of military command, who has general court-martial jurisdiction, is the proper reviewing officer (45-7, 8). And when the command in which the court was appointed has been dissolved, and its personnel merged in a command which is not, at the time, vested with general court-martial jurisdiction, the new commander is, nevertheless, the proper reviewing officer. The power to appoint a new court is distinct from the power of review. The latter being vested in the "commanding officer for the time being" regardless of his rank (45-49). See Article 12, Anno., par. 2. However, it has been held that an officer who sat as a member of the court at the trial, but has since succeeded to the command in which the court was convened, is disqualified from acting as reviewing authority (44-279). In such case, under the language of the present Article, it would seem that the proceedings should be reviewed by some other "officer exercising general court-martial jurisdiction."

8. If an organization which is merged in a higher command is one whose commander ordinarily has general court-martial jurisdiction, such jurisdiction continues notwithstanding the merger unless otherwise directed by competent orders. Thus, when the record of a general court-martial which had been convened by the commander of the Third Army Corps, A. E. F., was acted upon by a colonel who had assumed command of that corps on the date of the action, it was held proper although the Third Corps had then passed into the S. O. S. for transportation overseas, but not for disciplinary purposes (30-1377) (40-403 [1]). (See Article 8 for list of commanders who have general court-martial jurisdiction.)

9. When the accused, after trial and before review of the proceedings, is transferred to another command, the commander who convened the court and in whose jurisdiction the trial was held, is the proper reviewing authority (12-174, 554), but when the command under whose jurisdiction the trial was held has been discontinued and its units distributed in another command, the latter commander is the proper reviewing authority (12-175). But jurisdiction to review the record and act upon the sentence lies with the appointing

authority, or the successor to the command as a whole, and does not pass from him because of the transfer to another command of the station at which the court sat (46-64).

### *Reference to Staff Judge Advocate*

10. An assistant departmental, or corps area, judge advocate should not sit as a member of a general court-martial and afterwards prepare the review of the cases tried by the court in which he sat as such member (30-1354). See Article 11.

11. The staff judge advocate's review of a record of trial should contain, at the first appropriate point, a narrative account of the evidence offered by the prosecution and defense, instead of a chronological summary of the testimony of the various witnesses. Thereafter, in the review, the testimony may be quoted and referred to if necessary. What is primarily desired, however, is a narrative account of the incidents disclosed by the record (44-97). See also M.C.M. 87b).

11a. When a general court refers a question of future procedure in a case to the appointing authority, he must refer the matter to his staff judge advocate for consideration and advice (M.C.M. 49d.) When a reviewing authority is in disagreement with his staff judge advocate he should forward the record, with his own views and those of the judge advocate, to The Judge Advocate General for advice (M.C.M. 87b).

### *Form of Action*

(See M.C.M. 87b.)

12. The action should be formal in character, but a mere indorsement is legally sufficient. The action must be attested by the reviewing authority in his own hand. Approval of the findings only is not sufficient. The sentence must be approved. The reviewing authority must expressly approve or disapprove, he cannot merely "forward" the record for action of higher authority even though the case be one which requires confirmation. Neither is a recommendation of approval sufficient (12-174, 566, 579). The text of a reprimand imposed by the sentence of the court-martial should be included in the action of the reviewing authority (44-58).

13. The action of the reviewing authority need not be written in its entirety by himself, but it must be signed with his own hand (30-1380) (40-403 [3]). The action should bear date on which it is taken (signed) notwithstanding any delay between that date and the date of the promulgating order (30-1378) (40-403 [2]).

### *Promulgating Order*

(M.C.M. 87d.)

14. The usual promulgation order is a mere matter of form. It is a convenient method of communicating to those concerned the result of

the proceedings, but it is not necessary to the validity of the sentence. The proceedings and sentence are fully operative without such order provided the action of the reviewing authority, and, when required, the confirming authority, be properly endorsed upon, or appended to, the record, and actual or constructive notice be given to the party affected (12-567). A sentence imposing restriction does not become effective on the date it is adjudged but on the date it is ordered executed, after complying with statutory procedure including approval or confirmation (44-289). The use of a so-called "tentative" general court-martial order, in an effort to give the sentence publicity among the troops, is without authority and has no legal efficacy. The promulgation order should not be issued until the reviewing authority takes final action in the case (44-229).

14a. In the case of an officer, where the sentence does not require confirmation, but does involve suspension from rank and command, restriction, or other material change in his status, the commander issuing the promulgating order will immediately advise The Adjutant General of the Army of the sentence and date of its promulgation (M.C.M. 93). In any case which does not require confirmation (Art. 48) or appellate review (Art. 50) prior to the execution of the sentence, the promulgating order should be issued by the reviewing authority prior to forwarding the record to The Judge Advocate General (M.C.M. 95).

15. The order should be published by the reviewing authority, and if the accused has been transferred to another command a copy should be sent to such other command (12-567). However, in the absence of the reviewing authority overseas, the sentence having been duly approved by him, but no order published, it may be published by the War Department including the designation of the place of confinement (30-1384) (40-403 [6]). But the fact that the reviewing authority is beyond the continental limits of the United States does not deprive him of jurisdiction in the matter and the court-martial order carrying the sentence into execution should be issued by him (44-230).

16. The status of an accused in confinement whose sentence as approved or confirmed includes confinement and dismissal or dishonorable discharge, whether or not the latter is suspended, changes from garrison prisoner to general prisoner when the final action by the reviewing or confirming authority is announced (44-231).

17. A promulgation order should specifically direct the execution of the sentence; but where the order, though not specifically so directing, when read in connection with the action of the reviewing authority on the record, is susceptible of no other interpretation than that execution of the sentence was intended, the execution will be valid (30-280) (40-403 [6], pp. 1001-1002). The text of a repri-

mand provided for by a sentence of a general or special court-martial should be included in the promulgating order (44-58).

18. An order should be published in a case of acquittal on account of mental incapacity the same as in other cases (30-1361) (40-395 [43]).

#### *Loss or Destruction of the Record*

19. The destruction or loss of the record before action of the reviewing authority operates as an acquittal unless the court can be reconvened and a new record made up from extant original notes (12-557, 558). But after the sentence has been affirmed and promulgated the loss of the record is no obstacle to the enforcement of the penalty (12-576). See Article 37, Annotation Par. 81.

### IV. POWERS INCIDENT TO THE POWER TO APPROVE

#### *Lesser Included Offenses*

20. Authority to approve only so much of a finding of guilty as involves a "lesser included offense" does not justify the conviction of an offense entirely separate and distinct in its nature. Thus, absence without leave is not included in a charge for "abandoning post" under the 75th Article, nor in a charge for "misbehavior" under the 86th Article. And in no case can a charge be said to include a more serious offense than that charged. For example, "conduct to the prejudice" etc., under the 96th cannot include larceny (12-574). When, by substitutions and exceptions, the court fails to convict the accused of any offense, there can be no legal approval of a lesser included offense (40-Sup. 404 [1]). The true test as to whether the offense found is included in the one charged, is that all the elements of the offense found must be included among the elements of the offense charged (47-12, 297) (48-189, 190) (49-72). For example, see Art. 94, Annotation, par 21. A specification which charges a less serious offense (e.g. fornication) will not support a finding of a greater offense (e.g. adultery) although the evidence clearly shows accused guilty of the more serious offense (48-84.)

20a. When a court has convicted an accused of a lesser included offense upon which the statute of limitations (A.W. 39) has run (e.g. absence without leave in lieu of desertion, upon which the limitations are, in time of peace, 2 and 3 years respectively), and the record fails to show that the accused was advised of his rights as to the defense of the statute of limitations, the reviewing authority must disapprove so much of the finding as relates to such offense (M.C.M. 87b.)



*Remission of Portion of Sentence*

(See also Article 51.)

21. The approval of a finding of guilty of one of several charges which alone supports the sentence adjudged will give validity to such sentence, although similar findings on other charges are disapproved. Such sentences may, and usually are, mitigated if deemed too severe for the offense of which the conviction is approved. But a finding of guilty of a specification, but not guilty of the charge, will not support the sentence unless there is substituted a conviction of some included offense (12-559).

22. Approving a sentence and simultaneously remitting a portion of it is equivalent to approving only the sentence as reduced (30-1395) (40-404 [2]) (M.C.M. 87b).

23. When there has been an unusually long period of confinement prior to adjudging the sentence it is proper for the reviewing authority to remit a portion of it, but there is no fixed rule in this respect. The matter is entirely at the discretion of the reviewing authority (30-1396) (40-407 [4]).

24. A reviewing officer has no authority to *commute* a sentence. (A.W. 49; M.C.M. 87b). When a reviewing officer attempted to "reduce" a sentence of dismissal of an officer to a reprimand his action was held to be, in effect, an attempt to commute (i.e. to lessen the punishment by changing its character) and to be null and void. The reviewing officer was advised that his authority in the case was confined to "approval or disapproval" because a sentence of dismissal could not be reduced without commutation to some other form of punishment (42-213, 214).

25. When a master sergeant was sentenced by a special court to be reduced to the grade of private, and the reviewing authority approved and ordered executed "only so much of the sentence as provides for reduction to the grade of staff sergeant," it was held that such action constituted a disapproval of the original sentence and that the attempt of the reviewing authority to reduce the accused to the grade of staff sergeant was a nullity because the reduction of a noncommissioned officer to a lower noncommissioned grade by sentence of court-martial is not authorized (47-212).

*Rehearing*

(See M.C.M. 87d, 89)

26. Prior to 1920, when the sentence adjudged by the court was disapproved by the reviewing authority a new trial could not be ordered except upon the specific request of the accused, thus waiving his right to plead double jeopardy. Under the present code the jurisdiction of the court upon a rehearing is so restricted (see A.W.

52) as not to constitute double jeopardy. (40-408 (5) (6)). A rehearing should not be ordered if any part of the sentence is approved (M.C.M. 89).

*Reviewing Authority Cannot Correct Record or Increase Punishment*

27. The reviewing officer cannot correct the record of the court. In a proper case he may return it to the court for correction by proceedings in revision. Neither can he increase the punishment however inadequate he may deem it to be, but he may state his reasons for his action and comment unfavorably upon the conduct of the accused as shown by the evidence, and such comments do not constitute an addition to the punishment (12-555, 556, 559).

28. An illegal sentence is null and void and should not be acted upon by the reviewing authority. In such case the record should be returned to the court for proceedings in revision to revoke the void sentence and adjudge a new and legal sentence; a "rehearing" is not proper. (47-290.) (See M.C.M. 83, 87b.)

29. The reviewing authority cannot change the sentence to impose a form of punishment not included in that adjudged by the court, and an attempt to do so invalidates the whole sentence (30-1381, 1395) (40-404 [2], 407 [1]) (42-214).

30. If a sentence in excess of the legal limit is divisible, such part as is legal may be approved and executed (12-564) (43-269).

31. The death penalty is an indivisible sentence, and when it has been illegally imposed by the court it cannot be reduced by the reviewing authority to an authorized punishment. In such case the record must be returned to the court for revision proceedings (43-9, 10, 269). See Article 43 (Death Sentence) Annotation, par. 3.

32. The reviewing authority cannot add to the penalty imposed by the court. When an accused was sentenced to total forfeitures and confinement at hard labor for life, but the court failed to impose a dishonorable discharge, and the reviewing authority attempted to "mitigate" the sentence to dishonorable discharge, total forfeitures, and confinement at hard labor for fifteen years, it was held that by including the dishonorable discharge the reviewing authority did not "mitigate" but added to the punishment, and that his action was illegal (30-1395) (40-407 [2]).

33. A reviewing officer, after approving a sentence of life imprisonment imposed under Article 92 (Murder or Rape), may reduce the period of confinement to a definite term of years. See Article 51 (Mitigation, Remission and Suspension of Sentences). The sentence, being mandatory by law, must first be approved and then reduced by mitigation or remission. This may be done in the same action in which the sentence is approved (43-379, 380).

34. Neither the amount nor the period of the forfeitures may be increased by the reviewing authority over that imposed by the court, even though the net result would be to reduce the total amount forfeited (44-231).

### *Disapproval*

35. Approval gives life and operation to a sentence, while disapproval nullifies it. Disapproval is not a mere disapprobation, but a final determinative act putting an end to the proceedings in the particular case. Disapproval by the reviewing authority is final even in cases where an approval would require confirmation, but to be thus operative it must be explicit. A mere absence of approval is not a disapproval (12-563, 564) (43-424). See Article 40, Annotation, par. 2a.

36. A reviewing authority cannot disapprove a sentence and then proceed to mitigate or commute the punishment, since, upon disapproval there is nothing left upon which such action can be based (12-564).

37. The legal effect of a disapproval is the same whether any reasons are given or not, or whether the reasons given are well founded or not (12-564).

38. Disapproval of a finding of guilty has the effect of an acquittal; but disapproval of a finding of not guilty is a mere nonconcurrence and is without legal effect upon the status of the accused. He still remains legally not guilty (12-564).

39. If the findings of guilty of all the specifications are disapproved, and the finding of guilty of the charge is approved, the record is obviously insufficient to support any conviction (30-1306) (40-404 [1]).

39a. Article 37 (Irregularities—Effect of) requires a reviewing officer to exercise a sound discretion to the end that substantial justice may be done, and he should not disapprove any case because of the improper admission or rejection of evidence, or for errors in pleading or procedure unless, in his opinion, after an examination of the entire proceedings the substantial rights of the accused have been prejudiced (M.C.M. 87b.) This rule applies also to the reviewing agencies in the Judge Advocate General's Office (M.C.M. 100b.)

### *Finality of Action*

40. The reviewing authority acts in both a judicial and administrative or ministerial capacity. His action is final except in cases requiring confirmation, but the sentence may be modified through the power of pardon, commutation, remission, or suspension, and if void for want of jurisdiction or other cause it may be set aside (12-554).

41. The action of the reviewing authority when once published cannot be modified nor revoked. His rank or command is immaterial.

Thus a legal sentence of dismissal, duly approved, confirmed, and executed, is beyond the reach even of the pardoning power of the President (12-565, 569; 30-1403) (40-395 [36], Sup. 395 [37]). But if there be some fatal defect in the proceedings the sentence is void, and although it has been approved and put into execution, it may be so declared (12-572, 573; 30-1360) (40-403 [5] [6] (44-230) When an original (typewritten) order promulgating a sentence to confinement as expiring January 12, 1915, and a later printed order fixed such expiration as February 23, 1915, bearing the notation—"This order supersedes typewritten order publishing this case"—it was held that the first order legally completed the action of the reviewing authority and the second order was null and void (30-1360). In the foregoing decisions the sentences had been fully promulgated including notice to accused. The reviewing authority may recall and modify his action before publication and notice to accused (30-1379) (40-403 [4]). See Article 34, Annotation, as to review of proceedings of inferior courts-martial. (See also Articles 50h and 53.)

42. The transfer of a prisoner to the U. S. Disciplinary Barracks does not deprive the reviewing authority of the power to set aside his void action. In such case The Adjutant General should authorize the Commandant of the Disciplinary Barracks to release the man from confinement (44-230).

\* \* \* \*

*ARTICLE 48. CONFIRMATION. In addition to the approval required by article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:*

*a. By the President with respect to any sentence—*

*(1) of death, or*

*(2) involving a general officer:*

*Provided, That when the President has already acted as approving authority, no additional confirmation by him is necessary;*

*b. By the Secretary of the Department of the Army with respect to any sentence not requiring approval or confirmation by the President, when The Judge Advocate General does not concur in the action of the Judicial Council;*

*c. By the Judicial Council, with the concurrence of The Judge Advocate General, with respect to any sentence—*

*(1) when the confirming action of the Judicial Council is not unanimous, or when by direction of The Judge Advocate General his participation in the confirming action is required, or*

*(2) involving imprisonment for life or*

*(3) involving the dismissal of an officer other than a general officer, or*

(4) involving the dismissal or suspension of a cadet;

d. By the Judicial Council with respect to any sentence in a case transmitted to the Judicial Council under the provisions of article 50 for confirming action. (As amended by S.S.A. '48, effective Feb. 1, 1949.) (See M.C.M. 88, 100d.)

**ARTICLE 49. POWERS INCIDENT TO POWER TO CONFIRM.** *The power to confirm the sentence of a court-martial shall be held to include—*

a. *The power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;*

b. *The power to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence;*

c. *The power to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated;*

d. *The power to order the sentence to be carried into execution;*

e. *The power to remand the case for a rehearing under the provisions of article 52. (As amended by S.S.A. '48, effective Feb. 1, 1949.) (See M.C.M. 88.)*

## ANNOTATION

1. A sentence cannot be commuted (changed to a different nature) except by a confirming authority (M.C.M. 87b.)

### **ARTICLE 50. APPELLATE REVIEW.**

a. **BOARD OF REVIEW; JUDICIAL COUNCIL.** *The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Department: Provided, That the Judge Advocate General may, under exigent circumstances, detail as members of the Judicial Council, for periods not in excess of sixty days, officers of the Judge Advocate General's Department of grades below that of general officer*

b. **ADDITIONAL BOARDS OF REVIEW AND JUDICIAL COUNCILS.** *Whenever necessary, the Judge Advocate General may constitute two or more Boards of Review and Judicial Councils in his office, with equal powers and duties, composed as provided in the first paragraph of this article.*

c. **BRANCH OFFICES.** *Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General who shall*

be a general officer of The Judge Advocate General's Department, with any distant command, and to establish in such branch office one or more Boards of Review and Judicial Councils composed as provided in the first paragraph of this article. Such Assistant Judge Advocate General and such Board of Review and Judicial Council shall be empowered to perform for that command under the general supervision of The Judge Advocate General, the duties which The Judge Advocate General and the Board of Review and Judicial Council in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President: Provided, That the power of mitigation and remission shall not be exercised by such Assistant Judge Advocate General or by agencies in his office, but any case in which such action is deemed desirable shall be forwarded to The Judge Advocate General with appropriate recommendations.

d. ACTION BY BOARD OF REVIEW WHEN APPROVAL BY PRESIDENT OR CONFIRMING ACTION IS REQUIRED. Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: Provided, That the Judicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall

*submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.*

*(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 48a.*

**e. ACTION BY BOARD OF REVIEW IN CASES INVOLVING DISHONORABLE OR BAD-CONDUCT DISCHARGES OR CONFINEMENT IN PENITENTIARY.** *No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph d of this article, shall be examined by the Board of Review which shall take action as follows:*

*(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.*

*(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.*

*(3) In any case in which the Board of Review holds the record*

*of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.*

*(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.*

f. APPELLATE ACTION IN OTHER CASES. *Every record of trial by general court-martial the appellate review of which is not otherwise provided for by this article shall be examined in the Office of the Judge Advocate General and if found legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the Board of Review for appropriate action in accord with paragraph e of this article.*

g. WEIGHING EVIDENCE. *In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.*

h. FINALITY OF COURT-MARTIAL JUDGMENTS. *The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53. (As amended by S.S.A. '48, effective Feb. 1, 1949.) (See M.C.M. Chap. XXI.)*

(Note: The present Article 50 replaces Article 50½ which has been rescinded. The review procedure is materially modified in several respects, and very few opinions rendered under the old Article are now applicable. For that reason none are here cited. Two main points to be noted in the new Article 50 are as follows:



(1) Any record of trial in which a sentence has been adjudged requiring confirmation by the President or other confirming authority (see Article 48) must pass through the reviewing agencies in The Judge Advocate General's office, beginning with the Board of Review, before being submitted to the confirming authority (see Par. d).

(2) Every record of trial involving a sentence to dishonorable or bad-conduct discharge, whether suspended or not, or a sentence to confinement in a penitentiary, must be examined by the Board of Review and other agencies in The Judge Advocate General's office before promulgation (see Par. e).

\* \* \* \*

*ARTICLE 51. MITIGATION, REMISSION, AND SUSPENSION OF SENTENCES a. AT THE TIME ORDERED EXECUTED. The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended. The Judge Advocate General shall have the power to mitigate, remit, or suspend the whole or any part of a sentence in any case requiring appellate review under article 50 and not requiring approval or confirmation by the President, but the power to mitigate or remit shall be exercised by the Judge Advocate General under the direction of the Secretary of the Department of the Army. The authority which suspends the execution of a sentence may restore the person under sentence to duty during such suspension; and the death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.*

*b. SUBSEQUENT TO THE TIME ORDERED EXECUTED. (1) Any unexecuted portion of a sentence other than a sentence of death, including all uncollected forfeitures, adjudged by court-martial may be mitigated, remitted or suspended and any order of suspension may be vacated, in whole or in part, by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States disciplinary barracks, in which the person under sentence may be, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority or by the Judge Advocate General under the direction of the Secretary of the Department of the Army: Provided, That no sentence approved or confirmed by the President shall be mitigated, remitted, or suspended by any authority inferior to the President: And provided further, That no order of suspension of a sentence to dishonorable discharge or bad conduct discharge shall be vacated unless and until con-*

*firming or appellate action on the sentence has been completed as required by articles 48 and 50.*

*(2) The power to suspend a sentence shall include the power to restore the person affected to duty during such suspension.*

*(3) The power to mitigate, remit or suspend the sentence or any part thereof in the case of a person confined in the United States disciplinary barracks or in a penitentiary shall be exercised by the Secretary of the Department of the Army or by the Judge Advocate General under the direction of the Secretary of the Department of the Army. (As amended by S.S.A. '48, effective Feb. 1, 1949). (See M.C.M. 87b, 100c).*

## ANNOTATION

|                       | Pars. |
|-----------------------|-------|
| I. MITIGATION .....   | 1-8   |
| II. REMISSION .....   | 9-19  |
| III. SUSPENSION ..... | 20-25 |

## I. MITIGATION

1. To mitigate a sentence means to reduce the punishment in quantity or quality, or both, without changing its species. As an instance of mitigation both in quantity and quality, a sentence to confinement in a penitentiary for three years may be mitigated to two years in a military prison (12-177). And a sentence of confinement at hard labor for thirty days may be mitigated to hard labor without confinement and restriction to limits, both for thirty days. The general nature of the punishment remains the same; it is changed in degree and quality only (43-11). But a "fine" of \$500 cannot be changed by the reviewing officer to a "forfeiture" of \$50 per month (pay) for 10 months. There is a substantial difference between a "fine" and a "forfeiture." The first creates a general obligation, the second is applicable to pay only. Furthermore, in mitigation the time in which the punishment is to be executed must not be extended. To change a sentence from "fine" to "forfeiture" is "commutation," which can be effected only by a confirming authority (47-64, 65). (See Articles 48 and 49).

1a. In case of a mandatory sentence of life imprisonment imposed under Article 92 (Murder or Rape) the reviewing authority, after approving the sentence, may in the same action reduce it to a definite term of years (43-379, 380) (49-65).

2. The power is not limited to the time of approval of the sentence, but may be exercised as long as there remains any portion of the sentence unexecuted, and the subject is within the command or jurisdiction of the authority exercising it (12-177).

3. The power of mitigation passes with command over the subject (12-177) with exceptions named in the article. It cannot be delegated (12-176; 30-1395) (40-403 [1]). In the case of a general prisoner who has ceased to be a member of his original organization the power of remission or suspension of his sentence may be freely exercised by the commander in whose jurisdiction he is being held, such local commander having court-martial jurisdiction comparable to that under which the sentence was imposed (43-98).

4. A dishonorable discharge may be mitigated to a bad conduct discharge, but a bad conduct discharge cannot be mitigated; however, any forfeitures or confinement imposed with a dishonorable or bad conduct discharge may be mitigated to a lesser degree. The following mitigations are permissible: forfeiture of pay to detention for a like period or less; confinement at hard labor to hard labor without confinement for like period or less. The sentence of an officer to dismissal cannot be mitigated (12-177) (M.C.M. 87b).

5. An illegal sentence cannot be approved and mitigated to a punishment which would be legal (12-177). The proper action is to approve only so much of the sentence as is legal.

6. No military authority can mitigate a sentence imposed by a civil court (30-1425).

7. There is no logical connection between the amount of evidence produced at the trial and the degree of punishment to be imposed. After it has been determined that accused is guilty the punishment should be determined by the character of the offense. The fact that he was convicted upon the testimony of only one witness is no basis for mitigation of the sentence (30-1285) (40-395 [64]).

8. A discharged soldier serving a sentence of court-martial in a penitentiary is still subject to military jurisdiction for purposes of mitigation or remission of his sentence (12-569).

## II. REMISSION

9. The power of remission may be exercised so long as there remains any portion of the sentence unexecuted, and the subject is within the jurisdiction of the authority exercising it (12-177; 30-1395) (40-407 [3]). This power cannot be delegated (12-176). The sentence of a dishonorably discharged general prisoner who is being held in confinement awaiting removal to the U. S. Disciplinary Barracks, or other designated place, is subject to remission by the military authority competent to exercise such power at the post where the prisoner is being held (45-9, 176). A legal forfeiture imposed under Article 104 cannot be rescinded, vacated or disturbed after such forfeiture has been executed (46-341).

ga. The suspension or remission of a sentence may be conditioned

upon the happening of a future event, such as embarkation for overseas service, in which case the order may be conditioned upon actual sailing and made to be effective a certain number of days after departure; but the authority issuing such order may not authorize a unit commander to fix the time when it shall become effective (45-133, 134).

10. This power is commonly exercised after a part of the sentence has been executed and circumstances arise which were either not known or were not considered at the trial (12-563, 574, 575, 576). When a part or all of the sentence is remitted subsequent to the original promulgating order, an appropriate general or special court-martial order should be published. Similar action affecting a summary court sentence should be published in special orders (M.C.M. 94).

11. The action of a reviewing authority in approving a legal sentence and simultaneously remitting a portion of it is legally equivalent to approving only the sentence as reduced (30-1395) (40-404. [2]). But if an illegal sentence be first approved and then mitigated to a punishment which is legal the latter will be equally invalid and inoperative with the original sentence (12-177).

12. Remission of part of a sentence of confinement leaves the reduced sentence as though it were the original, and the prisoner is entitled to credit for good conduct time on the reduced sentence (12-582).

13. An unconditional remission cannot be revoked (12-840, 841).

14. Confinement and forfeiture are two distinct punishments, and remission of one does not affect the other (12-841).

15. Collected forfeitures cannot be remitted if the sentence was legal. If the sentence was illegal, and pay has been forfeited and collected under it, the amount may be credited on subsequent rolls as having been illegally collected (12-870: 30-1877, 1878) (40-pp. 891, 892). A legally adjudged forfeiture, when duly collected is beyond the reach of executive clemency and can be restored only by act of the Congress (30-1877) (40-891). (But see Article 53 Petition for New Trial).

16. A remission of forfeitures applies to forfeitures which have remained uncollected through error as well as those not yet accrued (30-1397) (40-407 [4]).

17. A sentence of an officer to loss of files cannot be remitted after he, with those who "jumped" him, have been promoted to the next higher grade, the sentence being fully executed and not subject to remission (30-1398) (40-407 [5]). The reduction of a noncommissioned officer to the lowest grade by sentence of court-martial is immediately effective upon approval of the sentence by the reviewing

authority, and being fully executed, cannot be vacated or remitted although the accused subsequently is found to have not been mentally responsible at the time of his offense and trial, the question of sanity not having been raised at the trial (47-48). But see Article 53 (Petition for New Trial). .

18. Acceptance of an officer's resignation while under sentence of a general court-martial operates as a constructive remission of the unexecuted portion of his sentence (30-531) (40-p. 991), but the vacation of an order suspending a dishonorable discharge and ordering the latter executed does not operate as a remission of a sentence to confinement which was imposed between the date of the suspension of the dishonorable discharge and the vacation of the suspension (30-1401) (40-410 [4]).

18a. If an officer, who is under sentence of suspension from promotion for one year, is promoted within the year, the promotion is valid and will operate to remit the unexecuted portion of the sentence (44-136).

19. No military authority can remit a penalty imposed upon a soldier by a civil court (30-1425).

### III. SUSPENSION

20. The authority competent to order the execution of the sentence may, at the time of his approval, suspend its execution in whole or in part (40-410 [1]); and such power is extended to any commander, having court-martial jurisdiction comparable with that under which the sentence was imposed, in whose command the person under sentence is serving or being held except penitentiaries and the U. S. Disciplinary Barracks (43-97, 98). This power may be exercised by superior military authority, or The Judge Advocate General under the direction of the Secretary of the Army.

21. A dishonorable discharge or any sentence except death, may be suspended for any period within the soldier's current enlistment, although beyond the term of his sentence to confinement (30-1400) (40-410 [1]). It is the better practice to suspend the discharge until the soldier's release from confinement then no further action is necessary in case he is not restored to duty prior to or at the termination of his sentence to confinement (43-62). As to suspension of dishonorable and bad conduct discharges, see M.C.M. 87b. The suspension, or vacation of a suspension, of the sentence of a general or special court-martial should be promulgated by a general or special court-martial order (M.C.M. 94).

22. The power to suspend the execution of a sentence is not limited to the term of the sentence, neither is the authority to vacate a suspension so limited. A suspension may be vacated at any time

during the soldier's current enlistment (40-410 [4]). For suspension of a sentence upon the happening of a future event see par. 9a, this Annotation.

23. General prisoners serving sentences for desertion in time of war, whether in the disciplinary barracks or in a penitentiary, may be restored to duty by the Secretary of War. Such men should not be restored as a class, but each case should be decided on its own merits (30-1618) (40-410 [3]).

24. A soldier in confinement under a suspended dishonorable discharge is not in a pay status, and any attempt by the reviewing authority to reserve to the soldier a part of his pay is ineffectual. But when the entire sentence of dishonorable discharge, total forfeitures, and confinement is suspended, the soldier is entitled to pay and allowances; and where a soldier is serving a sentence to confinement under a suspended dishonorable discharge and the unexecuted portion of the sentence to confinement is suspended and the soldier restored to duty, he is entitled to pay and allowances from the date of such restoration to duty (30-1882) (40-410 [2]) (43-425, 426) (44-419).

25. The vacation of suspension of a dishonorable discharge and its execution will not abate a court-martial sentence to confinement imposed between the dates of suspension and execution of the discharge (40-410 [4]). The death of a soldier while under a suspended sentence of dishonorable discharge remits the unexecuted part of the sentence as he will have died "in the military service," even though he was serving, at the time of his death, for fraudulent enlistment (40-Sup. 410 [5]). The suspension of a dishonorable or bad conduct discharge cannot be vacated until the sentence, by which it was imposed, is confirmed and the proceedings have been reviewed as required by Articles 48 and 50 (M.C.M. 87b).

\* \* \* \*

*ARTICLE 52. REHEARINGS. When any reviewing or confirming authority disapproves a sentence or when any sentence is vacated by action of the Board of Review or Judicial Council and the Judge Advocate General, the reviewing or confirming authority or the Judge Advocate General may authorize or direct a rehearing. Such rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense*

*not considered upon the merits in the original proceeding.* (As amended by S.S.A. '48, effective Feb. 1, 1949).

#### ANNOTATION

(M.C.M. 84, 89)

1. Formerly a new trial could not be ordered where the sentence adjudged upon the first trial was disapproved except upon the specific request of the accused, thus waiving his right to plead double jeopardy. Retrials have, therefore, been rare in our military jurisprudence (12-569). The jurisdiction of the court upon a rehearing under this Article is so restricted as not to constitute double jeopardy. No reconsideration of an acquittal, or increase of sentence, is authorized except as noted in paragraph 4 below (40-408 [5] [6]).

2. When a legal sentence has been duly approved and promulgated by competent authority, the granting or ordering of a new trial is beyond the power of any military commander or the President (12-569). This decision is not disturbed by any provision of Article 52, under which a rehearing may be ordered only when the record of trial is found legally insufficient to support the findings and sentence. Even if the sentence is approved only in part there can be no rehearing (30-1375) (M.C.M. 89). (But see Art. 53—Petition for New Trial).

3. When a sentence is disapproved or vacated without at the same time directing a rehearing, such action constitutes a final disposition of the case and a rehearing cannot be subsequently ordered (43-97, 424) (47-175). Any modification of the sentence made mandatory by the action of the Board of Review and The Judge Advocate General must be accomplished by supplementary action of the reviewing authority over his personal signature (44-97).

4. Upon a rehearing there must be a complete change in the personnel of the court (40-408 [7]), and the sentence may not exceed that adjudged upon the original trial, as approved by the reviewing authority, unless based upon conviction of an offense not considered upon its merits in the original proceedings (30-1394, Sup. 1375, 1394) (40-408 [6]) (48-133, 134); and where accused was tried for desertion, convicted of absence without leave only, and sentenced to dishonorable discharge and total forfeitures, and the reviewing authority disapproved and ordered a rehearing upon which accused was convicted of desertion and given the same sentence as before, it was held that while the record supported a conviction of absence without leave only, the sentence might stand (40-408 [6]).

5. Upon a rehearing the testimony of absent witnesses may be read from the record of the first trial, provided such record is properly authenticated and identified, and the submission of the

first record with, and as a part of, the record of the rehearing, and the fact that the testimony of the absent witnesses is not made a physical part of the rehearing record, will not constitute any error under this Article (30-Sup. 1369a) (40-390 [1]). Such testimony of absent witnesses may be used in a rehearing when the case was originally capital but not so upon rehearing because the first court imposed a sentence to confinement only (45-175). See Article 25, Anno., par. 6b.

\* \* \* \*

*ARTICLE 53. PETITION FOR NEW TRIAL. Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: Provided, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: Provided, That only one such application for a new trial may be entertained with regard to any one case: And provided further, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States. (As amended by S.S.A. '48, effective Feb. 1, 1949).*

(Note: This article is entirely new. The former code contained no provision for a "Petition for New Trial." The substance of the former Article 53 has been transferred to the new Article 51).

#### ANNOTATION

(See M.C.M. 84 & Chap. XXII)

1. The petition should show good cause for the remedy requested, and may be submitted by the accused, his counsel or representative. It may be submitted after the accused has been separated from the



service within the prescribed limits of time. It cannot be presented after his death. Completion of action under Article 50 and, when required, Article 48, constitutes "final disposition of the case upon initial appellate review." The presentation of a petition for a new trial under this Article does not operate to stay execution of the sentence. (M.C.M. 101, 102, to which refer for details of procedure).

## CHAPTER X

### PUNITIVE ARTICLES—ENLISTMENT; MUSTER; RETURNS

*ARTICLE 54. FRAUDULENT ENLISTMENT. Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct. (See M.C.M. 142).*

#### ANNOTATION

|                          | Pars. |
|--------------------------|-------|
| I. IN GENERAL .....      | 1-9   |
| II. SPECIFICATIONS ..... | 10    |
| III. PROOF .....         | 11-18 |
| IV. VARIANCE .....       | 19    |

#### I. IN GENERAL

1. Prior to the change in this Article, in 1892, so as to make the receipt of pay or allowances an essential element of this offense, fraudulent enlistment could not be punished as a military offense because when the fraud was committed the accused was a civilian and not subject to military law, unless already in the service under a former enlistment (12-573, 605; 30-1543) (40-412 [2])).

2. Fraudulent enlistment without a discharge from a former enlistment (see Article 28, Certain Acts Constitute Desertion) is punishable under the 96th (General) Article (30-1472) (40-454 [58]). So also in the case of a deserter from the Navy, or a member of the National Guard, who conceals the fact (12-606). See (General) Article 96, Annotation, par. 19.

3. One who gives his true age, although it is below the prescribed minimum, is not guilty of fraudulent enlistment (12-605), neither is he so guilty if he has committed a felony and does not conceal

that fact (12-606), nor if he is already in the service and so states (30-1538) (40-395 [19]). Concealment of the disqualifying fact or circumstances is essential (40-249 [3], page 1003).

4. Fraudulent enlistment by a minor is punishable under this Article, and if he is under charges of this or other military offense the interests of military justice are paramount to the right of a parent and he may be held for such military offense before the right to his discharge be passed upon by a civil court in *habeas corpus* proceedings (12-448).

5. A fraudulent enlistment is not void, but voidable only at the option of the government. Statutes prohibiting the enlistment of deserters, convicted felons, intoxicated persons, minors, etc., are merely directory and do not make such enlistments void. But if the disqualification is one which incapacitates the person from making any contract, such as insanity, idiocy, etc., then the enlistment is void (12-606, 607).

6. This offense may be waived and the soldier be retained in the service (30-359, 1429) (40-249 [4]), and in such case the soldier is entitled to an honorable discharge at the expiration of the enlistment if the character of his service otherwise so warrants (12-609, 610). If a deserter who enlists under a different name is held to his second enlistment, it constitutes such waiver (30-177).

7. A soldier may be tried for desertion from a fraudulent enlistment (12-606), as well as for the fraudulent enlistment (12-495).

8. A fraudulent enlistment may be tried, or discharged without honor, or restored to duty, but if tried, convicted and sentenced, but not dishonorably discharged, he should not, in justice, be then summarily discharged (12-606, 607, 608, 609). However, when a deserter, serving in a fraudulent enlistment, was confined and charged with desertion and fraudulent enlistment, it was held that such action constituted a decision by the military authorities to regard him as still in his first enlistment, and to suspend service in his second (fraudulent) enlistment. While serving a sentence for such desertion and fraudulent enlistment he was discharged without honor from his first enlistment and held to his second, and the time thereafter spent in confinement for the desertion and fraudulent enlistment was held to count upon the second enlistment (30-1536).

9. Fraudulent enlistment has both criminal and civil aspects. It is punishable as an offense under this article and also has a bearing upon the validity of the enlistment contract, and notwithstanding the judicial determination, administrative determination of the fact of fraudulent enlistment may, none the less, be made (30-246) (40-412 [1]).

## II. SPECIFICATIONS

10. Under this Article it is necessary to allege and prove, not only entry into the service by means of some fraud, but also the receipt of pay or allowances, otherwise the proceedings are fatally defective (12-573; 30-1543). A plea of guilty will not cure such defect in a specification (30-1543) (40-412 [2]).

## III. PROOF

11. To prove prior enlistment with no discharge therefrom, a certificate of the Adjutant General to the effect that the records show such prior enlistment with no discharge therefrom is not admissible because it states a mere conclusion of the examiner. The original records, or duly authenticated copies, must be produced, leaving the court to judge their import (30-1537) (40-395 [16]).

12. Service record or pay card entries which are secondary records compiled from other, and original, sources are not admissible to prove receipt of pay or allowances without the necessary foundation having been laid for the receipt of such secondary evidence. Likewise entries upon an individual equipment record, not certified to, nor bearing any officer's or soldier's initials, as required by the instructions on the form, are not competent evidence to prove receipt of allowances (30-1537) (40-395 [19]).

13. The testimony of a witness that he has examined certain records and that they show accused to have been rationed and quartered with a certain organization for a certain period, is not admissible. The records themselves should be produced (30-1537) (40-395 [19]).

14. The receipt of food, clothing and shelter while in involuntary confinement awaiting trial does not constitute receipt of allowances within the meaning of this Article (30-1542) (40-412 [4]).

15. A photostatic copy of a record which contains nothing to connect it with the accused, although duly certified to be "the discharge record of the accused," is not competent evidence of such discharge because the certificate of the authenticating officer was not evidence of the nature of the paper, but merely an authentication thereof. A certified copy proves nothing more than the original would without the certificate (30-1537) (40-395 [17]).

16. Entries upon a muster roll purporting to record the discharge of a soldier are not admissible to prove such discharge where it appears that such entries are based upon reports from other sources and are therefore merely hearsay (30-1537) (40-395 [19]). (But see M.C.M. 130c).

17. An order directing the dishonorable discharge of a soldier is not competent evidence of the fact that he was actually so discharged,

especially when the order shows that the dishonorable discharge was suspended until the expiration of a sentence to confinement, although the term of confinement has expired. Nor can a dishonorable discharge be proved by a general court-martial order coupled with an entry in a guard report to the effect that accused was "released and discharged" on a certain date, where the officer who signed the guard report was not charged with the duty of executing the discharge, and there was no evidence of the kind of discharge given (30-1540). Neither can a discharge for "inaptitude," or any form of summary discharge under A. R. 615-360, be proved by the order directing it (30-1541). In all such cases there must be first-hand evidence that the kind of discharge alleged was actually executed. Proof that it was ordered is not proof that it was done (40-395 [17 a], 412 [3]).

18. As to identity, when the accused is charged with several enlistments under different names, the method of proof prescribed in M.C.M. 142 should be followed. A mere indorsement from the Adjutant General to the effect that certain fingerprints are of the same person is not sufficient (30-1539) (40-395 [17]).

#### IV. VARIANCE

19. Any material variance between allegations and proof as to the fact which was misrepresented or concealed will be fatal. Under a specification alleging concealment that accused had previously been discharged for physical disability, or discharged with character "fair," the court cannot legally, by exceptions and substitutions, convict him of fraudulent enlistment by concealing prior service (30-1544) (40-412 [5]).

\* \* \* \*

*ARTICLE 55. OFFICER MAKING UNLAWFUL ENLISTMENT. Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.* (See M.C.M. 143).

#### ANNOTATION

1. Under the statute which provides for the discharge of a minor who has enlisted "without the written consent of his parent or guardian," the word "parent" refers primarily to the father, if living, unless the mother has, by court order, been given sole custody of the son (30-246) (40-231).

2. For the classes of persons prohibited by law from enlistment or reenlistment in the army see M. L. U. S. 248, 249. Any person who "has been convicted of a felony" is so prohibited. Under the Federal

law a felony is any offense punishable by imprisonment for more than one year (40-249), but the term "felony" is to be defined by State as well as Federal law, according to the jurisdiction in which conviction occurred (40-Sup. 249). A pardon does not remove the disqualification (40-249 [2]).

\* \* \*

*ARTICLE 56. FALSE MUSTER. Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct. (See M.C.M. 144). (See also Art. 44).*

#### ANNOTATION

1. The present-day "Morning Report" is not the equivalent of the "Muster Roll" within the meaning of this Article (47-236, 237).

\* \* \*

*ARTICLE 57. FALSE RETURNS; OMISSION TO RENDER RETURNS. Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunition, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct. (See M.C.M. 145). (See also Art. 44).*

#### ANNOTATION

1. False entries in a unit "council book" made to conceal an embezzlement of unit funds by the custodian, makes the council book a "false return" within the meaning of this Article (45-232).

## CHAPTER XI

### PUNITIVE ARTICLES—DESERTION; ABSENCE WITHOUT LEAVE

*ARTICLE. 58. DESERTION. Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct. (See M.C.M. 146).*

#### ANNOTATION

|   | Pars.  |
|---|--------|
| I. IN GENERAL .....                     | 1-10   |
| II. JURISDICTION .....                  | 11-16  |
| III. REMOVAL OF CHARGE .....            | 17-25a |
| IV. ALLEGATIONS AND PROOF .....         | 26-39b |
| V. VARIANCE .....                       | 40-41a |
| VI. ATTEMPT TO DESERT .....             | 42-44a |
| VII. WAR-TIME DESERTION .....           | 45-53  |
| VIII. DRAFTED MEN .....                 | 54-58  |
| IX. NATIONAL GUARD AND VOLUNTEERS ..... | 59-63  |
| X. PUNISHMENT .....                     | 64-69  |
| XI. CIVIL DISABILITIES .....            | 70-74  |

#### I. IN GENERAL

1. An officer or enlisted man who absents himself, without authority, from the military service with intent not to return thereto is a deserter (12-399). But see Article 28 (Certain Acts Constitute Desertion) which provides in substance that a soldier who leaves his organization or station without authority and joins another with intent not to return to the former, or who goes absent without leave from his organization or place of duty, even temporarily, "with the intent to avoid hazardous duty or shirk important service" is punishable as a deserter though he does not leave "the service of the United

States". The fraudulent enlistment does not terminate his status as a deserter (40-416 [3]). Article 28 is not a punitive article—it is merely a rule of evidence. A charge of desertion as therein defined should be laid in the usual form as a violation of Article 58 (M. C. M. 146). Absence without leave, coupled with an intent to return only upon the happening of an uncertain event, constitutes desertion (30-1513) (40-416 [9]).

1a. Desertion (whether ordinary, or one of the types described in Article 28) may be charged without any allegation of a specific intent (see form of specification in M.C.M. App. 4), but when a specific intent is alleged, it must be proved as alleged (44-142).

2. The offense is complete when the requisite intent is fully formed and an overt act looking towards its consummation has been committed (12-399; 30-182). The forming of the intent may either precede or follow the overt act. Absence from station is not necessarily involved. A soldier may be a deserter although he has not actually left the post where his organization is stationed (12-399).

3. One who permits himself to be driven out of the service by some illegal means, such as the sentence of an illegal court composed of enlisted men, or by ill-treatment, is technically a deserter (12-400, 414).

4. Desertion and misbehavior before the enemy (see Art. 75) are distinct offenses. The latter may be evidence of the former (12-400), and a soldier may be convicted of both when the same evidence is the basis of both charges (30-1545) (40-428 [5]).

5. An escape, though generally evidence of an intent to desert, is not always conclusive, since it may have been merely to avoid confinement while awaiting trial, to get liquor, or some other minor purpose. An escape while awaiting trial for desertion, with intent not only to avoid confinement but to quit the service, is an additional desertion (12-399, 400).

6. Desertion may be administratively determined for certain purposes (12-416), as when a soldier is dropped from the rolls as a deserter he is removed from the active list and is not again restored until he is returned to military control (30-958) (40-859 [3]). This is often done even though sufficient evidence to establish desertion is not then available (30-174) (40-pp. 995, 997). In such case a charge of desertion is set up on the record which, upon the soldier's return, must be disposed of by some regular procedure such as removal by competent authority or trial (30-175) (40-p. 996).

7. The fact that a soldier of foreign nationality receives notice to report for military duty in his former country or be there considered a deserter, is no defense to a charge of desertion from our service (12-414, 415).

8. A soldier who obtains and uses a pass for the purpose of deser-



tion is not thereby protected from apprehension as a deserter (12-12).

9. A member of the United States Army Reserve who enlisted in the Canadian army in 1916 thereby became guilty of desertion (30-687).

10. Desertion cannot be a joint offense; but when three accused were jointly charged with desertion, and there were allegations and proof that each had committed the offense, and none of them objected to a joint trial or to the court as constituted, it was held that, though irregular, the substantial rights of the accused were not prejudiced (30-Sup. 1516) (40-416 [17]).

## II. JURISDICTION

11. Absence without leave is always included in desertion, and acquittal of the latter includes an acquittal of the former. If, upon trial for desertion, the accused is convicted only of absence without leave he is thereby acquitted of desertion (12-415, 416).

12. If a soldier who has been dropped as a deserter be brought to trial for absence without leave only by order of an officer exercising general court-martial jurisdiction, his conviction or acquittal of the lesser offense eliminates the charge of desertion. Likewise, his restoration to duty without trial by authority competent to order him tried for desertion constitutes "constructive condonation of desertion" which he may assert as a defense in a subsequent trial for desertion (12-839; 40-397 [1]; M.C.M. 69b). See Art. 21, Anno., par. 10.

13. A recruit who "elopes" after having been accepted at a recruiting station and given transportation and subsistence for the journey to the post where he would have been enlisted, cannot be tried for desertion (12-426).

14. The right of the military authorities to arrest a deserter and bring him to trial is paramount to any right of control over him by a parent on the ground of minority (12-401); and the amenability to trial of a deserter is not affected by the fact that his enlistment was fraudulent (12-414).

15. A soldier legally cannot be guilty of a desertion committed after he has been dishonorably discharged (30-1499) (40-416 [11]). However, if the dishonorable discharge was from a second (fraudulent) enlistment and he afterwards surrenders himself as a deserter from his first enlistment, and, after trial, conviction and sentence is restored to duty and again deserts, he may be tried for the last desertion. Although the dishonorable discharge was a complete expulsion from the service and terminated all unexpired enlistments, his subsequent voluntary surrender and service, and acceptance of such service by the government, constitutes a constructive reenlistment (30-348) (40-467). See also Article 108, Annotation, Par. 38.

16. A general prisoner, under sentence of confinement and a suspended dishonorable discharge, who escapes, may be tried for desertion (30-1328) (40-359) [15]).

### III. REMOVAL OF CHARGE

17. Restoration to duty without trial does not, of itself alone, remove the charge of desertion (12-423), but when ordered by competent authority it is a complete answer to the charge of desertion before a court-martial (12-415). If the soldier has reenlisted, he may be restored in the second (fraudulent) enlistment (12-415, 416; 30-177); and if he again deserts he may be tried for such subsequent desertion (30-1500) (40-p. 996). The "constructive condonation" referred to in M.C.M. 69b relates only to a charge of desertion (43-376, 377). A soldier was under a charge of desertion. His organization was in contact with the enemy. Pending trial he was used for wire detail and other duties in the front lines. Although not under a regular guard, he was never left alone. On trial he pleaded in bar that his restoration to duty was a constructive condonation of the alleged desertion. Held: Such plea is appropriate only when a deserter has been "restored to duty without trial" pursuant to regulations. No such action was shown in the instant case. Conviction sustained (44-229). See Article 69, Anno., par. 17.

18. A pardon does not "remove" the charge of desertion, nor alter the fact that the party did actually desert (12-418; 30-175) (40-154 [2]); but when the charge is "removed" by competent authority the case stands as though the charge had never been made.

19. A charge of desertion is removed by an honorable discharge from the enlistment in which the desertion occurred (12-420; 30-178) (40-466 [6]); but such discharge does not relieve the soldier from a charge of desertion committed in a prior enlistment from which he has not been discharged (12-462). (See Art. 108, Anno., par. 4).

20. Trial and acquittal by an inferior court having no jurisdiction does not remove the charge (12-423); but when a conviction and sentence for desertion were vacated because the court was illegally constituted and the soldier was restored to duty and subsequently honorably discharged, the charge of desertion was held to have been removed (30-Sup. 178) (40-466 [6]).

21. Where a soldier has been dropped as a deserter the charge should not be removed, nor should any promise of removal be made, until the soldier is returned to military control (30-175) (40-416 [3]).

22. When an administrative charge of desertion has been removed by competent authority, such action is not, in effect, a pardon, nor is it a bar to trial for the absence without leave involved (30-179) (40-p. 997).

23. When a soldier is tried for desertion, convicted, and sentenced to punishment not including a dishonorable discharge, and, after satisfying the sentence, is restored to duty, the charge of desertion is fully expiated (30-181) (40-466 [6]).

24. The following are instances in which it has been deemed proper to "remove" a charge of desertion: where the soldier was a prisoner in the hands of the enemy; was insane when he deserted; by reason of miscarriage of mail did not receive orders; prevented by accident from returning; erroneously informed that a furlough had been granted him (12-420, 421). The question is largely a matter of discretion of the officer exercising the jurisdiction.

25. The discharge without trial of an alleged deserter for physical disability, desertion not admitted, has the effect of removing the charge of desertion (30-176) (40-1521 [2]); and if it is a case of mental incompetency the soldier may be discharged without trial by order of the Secretary of War (30-179) (40-p. 997).

25a. A charge of desertion may be set aside and the soldier discharged for disability by competent authority. It is not mandatory that he be tried by court-martial or discharged without honor (42-92).

#### IV. ALLEGATIONS AND PROOF

26. Both elements of the offense, *i.e.*, the unauthorized absence and the intent permanently to abandon the service (or avoid hazardous or important duty—see Article 28) must be proved. The intent may be inferred from the circumstances attending the absence and its duration, but each case rests upon its own peculiar facts. No general rule can be laid down (12-15, 399). Absence without leave alone is not sufficient (30-1511, 1512, 1513) (40-416 [9]) (42-16) (43-139, 140). An inference of an intent not to return cannot be drawn from the sole fact that the absence commenced by an escape from confinement when there are additional facts in evidence which negative such intent (45-277). The fact that accused was in restriction pending trial for a former unauthorized absence, standing alone, does not raise a legal implication of intent to desert (47-123).

26a. Prolonged, unexplained absence without leave will justify an inference of an intent not to return (M.C.M. 146a) (46-203) but mere absence for a short period is not desertion without other circumstances indicating an intent not to return. While such circumstances occur more frequently in war than in peace, the mere fact that it is wartime does not make a short absence desertion (42-325). An accused who was in confinement awaiting trial for a wilful and flagrant disobedience of orders of his superior officer escaped. A week later he surrendered himself, in civilian clothes, at an Army camp in another state a considerable distance away. Held that, notwithstanding the

short absence, the circumstances warranted a finding of desertion (43-62). But when the specification charged that accused, "on or about 24 April 1944, did desert the service of the United States and did remain absent in desertion until he was apprehended at ..... on or about 17 May 1944" and the court found him guilty except the words "and did remain absent in desertion until he was apprehended at ..... on or about 17 May 1944," the conviction was disapproved. The evidence showed that accused escaped from confinement on 24 April 1944. By its finding, with the exceptions noted, the court determined only that accused deserted on 24 April 1944, apparently basing its solitary finding upon the sole fact that accused's absence was initiated by an escape from confinement. Such inference, while it may be proper when supported by other findings, cannot be drawn from that circumstance alone (44-379).

26b. In the case of a lieutenant of the Army who left his station without leave, enlisted in the Marine Corps, was apprehended and tried for desertion, it was held that although the second paragraph of Article 28 does not apply to officers, his enlistment in the Marine Corps was evidence of an intent not to return to the Army (42-362).

26c. In a trial for desertion by absence without leave to avoid hazardous duty (Article 28) it was proved that accused knew that his organization, a "landing team," was about to embark for overseas service. The prosecution asked the court to take judicial notice that, at the time of the trial, accused's organization was engaged in combat in Africa. Held, that the court could take judicial notice that it was time of war and that embarkation for overseas might involve combat or other hazardous duty, but that overseas movements being secret, the activities of troops after embarkation were not matters of common knowledge of which the court could take judicial notice (43-61). See Article 38 (President May Prescribe Rules) Annotation, pars. 6, 6a, and 7. (45-485).

26d. A garrison prisoner went absent without leave from his confinement and was apprehended 33 days later at his home. The day prior to his departure he was notified of orders to report to a port of embarkation. This fact, together with his unexplained absence terminated by apprehension, was held to constitute a sufficient basis for a finding of desertion (43-268).

26e. Under a charge of desertion to avoid hazardous duty (e.g. engagement with the enemy) the lack of proof as to the manner, time and place of the termination of accused's absence is immaterial. The offense was complete when accused went absent without authority to avoid the impending hazardous duty (44-232).

26f. Absence without leave for 37 days from an organization stationed in an active theater of operations in an allied foreign country, subject to intermittent attacks from air, sea and land, was held suf-

ficient to warrant a conviction of desertion. The fact that accused surrendered in uniform, and possibly wore it throughout his absence, was held to be without significance under the circumstances of the case (44-232, 233).

26g. An accused was transferred from an artillery unit to an infantry battalion. Upon his arrival at the battalion post he immediately went absent without leave for three months during which time the battalion was engaged in combat. When apprehended, accused stated that he "would not soldier in the infantry." Held: That all essential elements of desertion to "avoid hazardous duty" were established or necessarily to be inferred from the evidence, and conviction was sustained (46-91).

27. Under present day transportation facilities an intent to desert cannot be inferred by the mere fact that an absentee is found two hundred miles from his proper station, other substantial evidence of such intent being lacking; neither can such inference be based alone on the fact that accused surrendered after an absence of twenty days at a place forty miles from his station (30-Sup. 1513) (40-416 [9]).

28. A mere charge of desertion is not evidence of the fact (12-413); so an entry upon a morning report, muster roll, or other similar record, that a soldier deserted, or was dropped in desertion, on a certain date, is not evidence of desertion (12-414); and when the record is not a document of original entries, but is made up from other sources (*e.g.*, a service record) it is not admissible as evidence for any purpose without the necessary foundation being laid for the admission of secondary evidence (30-1441, 1503, 1507, 1508, 1509) (40-395 [18] [19]) (43-60). (But see Art. 37, Anno., par. 59).

28a. A "report of desertion" made in compliance with regulations is not proof of the statements it contains. It is merely a memoranda of available evidence and cannot be used as a substitute for the evidence itself (43-60). (But see M.C.M. 130c).

29. The statement of a witness that accused "deserted" on a certain day is not evidence of desertion. The witness should state the circumstances within his knowledge, leaving the court to judge whether they show desertion (12-414).

30. The enlistment of accused need not be established by direct evidence. In a case where no record of enlistment could be found, but there was evidence of an admission by accused that he had enlisted on or about a certain date, and evidence of actual service by him and of his voluntary surrender to the military authorities, it was held sufficient to warrant a finding that he had enlisted (30-1504) (40-395 [3]). But a general prisoner cannot be convicted of desertion unless it affirmatively appears, and the record shows, that he is still in the service (30-Sup. 1515 a) (40-416 [11]).

31. Statements made by accused such as that he "wanted to get out of the Army", "did not care where he went so long as he did not have to go back to the post", that he was "tired of working for the government", and the like, while not amounting to confessions of desertion, are admissible as bearing upon the matter of intent. A confession is an admission of guilt of a criminal act including all its essential elements. An admission of facts and circumstances from which guilt may be inferred is not necessarily a confession (30-1504). Where the only evidence of absence without leave was accused's own admission, a conviction of desertion was disapproved (30-1506). See notes on confessions under Article 24. See also (40-395 [3] [11]). The *corpus delicti* in desertion is the absence without leave (40-416 [7a]).

32. Where a soldier is induced to admit desertion in order to obtain a discharge without trial and is subsequently tried, such admission should not be used against him (30-Sup. 1504) (40-395 [3]).

33. A morning report entry which is of hearsay and secondary origin, and admitted over objection of the defense, is not sufficient to establish the date of absence without leave for purposes of a plea in bar of the statute of limitations (30-Sup. 1507) (40-395 [18]). (But see M.C.M. 130c).

33a. Extract copies of company morning reports certified by a personnel adjutant (regimental or separate battalion) are not admissible, if objected to, to prove absence without leave in a trial for desertion. Such unit personnel officer is not the official custodian of company morning reports (42-358-360).

33b. In a trial for desertion an extract copy of the morning report not signed by the commanding officer, but by another officer "for" him, is not admissible if objected to. Nor does the testimony of the first sergeant that he is the custodian of the morning report and responsible for the entries therein establish the fact. But failure to object to such extract copy is a waiver of proper authentication (43-184).

34. Where the only evidence of the accused's absence without leave was the testimony of a Lieutenant of the company that the First Sergeant had reported the fact to him, a conviction of desertion was disapproved (30-1439) (40-395 [21]). If evidence is hearsay, as this was, the fact that the information was "official" does not make it admissible.

35. Under a charge of desertion a plea of guilty of absence without leave only negatives the essential element of the desertion, *viz.* the intent not to return, and conviction of desertion cannot be sustained without evidence to establish such intent. In such case the presumption that the accused did not intend to return which might arise from a prolonged absence is not sufficient to overcome the express

denial of such intent by the plea of absence without leave only (30-1511) (40-416 [8]) (43-269, 270).

36. When it is alleged that the absence was terminated by apprehension and there is no competent proof of apprehension, it will be presumed that accused voluntarily surrendered (30-1510) (40-416 [7]).

37. When an accused has been convicted under several specifications alleging desertions from separate and distinct enlistments, the fact that the periods of absence overlap, either wholly or in part, does not affect the validity of the conviction of either (30-1516) (40-416 [3]).

38. Desertion cannot be a joint offense, and where two accused (prisoners) were charged with desertion in the execution of a conspiracy, and did in fact escape together and were later apprehended together, but there was no proof of the conspiracy (*i.e.*, preconcerted plan) it was held that they could be convicted merely of separate desertions (30-1310) (40-416 [17]).

39. In a prosecution for desertion an affidavit is not admissible to prove the fact of apprehension unless by the express consent of the accused with full knowledge of his rights as provided in M.C.M. 132b (30-1505) (40-395 [13]).

39a. A "Report of Apprehension or Surrender of Deserter" is not admissible in evidence to prove apprehension, if objected to, because it is not based upon personal knowledge of the officer making it (42-158, 159). (But see M.C.M. 130c).

39b. In a trial for desertion a document containing a purported statement of a noncommissioned officer, not sworn to, and entirely unauthenticated, its author not being present in court, is not sufficient proof of "apprehension." In the absence of other evidence it must be concluded that the absence was terminated by surrender. and (being a peace-time desertion) the punishment cannot exceed dishonorable discharge, total forfeitures, and confinement at hard labor for 1½ years (M.C.M. 117c) (43-270, 271).

## V. VARIANCE

40. The place of desertion is not of the essence of the offense, and failure to prove the place as alleged is not a fatal variance. The court may amend the specification to correspond to the proof. The same is true as to the place of apprehension or surrender (30-1317, Sup. 1514 a) (40-416 [10] [14]).

40a. Under a charge of desertion, the accused cannot be convicted of escape from confinement in violation of Article 69 because the latter is not a lesser offense included in desertion (43-62).

41. Under a specification alleging desertion terminated by sur-

render the court is not authorized to convict accused of desertion terminated by apprehension, and if such finding is made the record is sufficient to support only so much of the finding as involves desertion terminated in a manner not stated (30-Sup. 1516 a) (40-416 [14]).

41a. When a specification alleges desertion "with intent to avoid hazardous duty," or "to shirk important service," proof merely of an intent not to return is a fatal variance and the conviction cannot be sustained. The specific intent alleged must be proved, and neither the court nor the reviewing officer may substitute the wholly different offense of absence without leave with intent not to return (42-322, 323) (43-139, 140) (44-142).

## VI. ATTEMPT TO DESERT

42. To constitute an attempt to desert there must be, not only the intent to desert, but an overt act done in pursuance of such intent, and proximately tending to its consummation. Mere preparation is not enough. So, attempting to sell a pistol to get money to desert is not an attempt to desert (30-1514) (40-416 [1]).

43. An attempt, by concealing one's identity as a soldier, to obtain permission to leave the post with intent to desert, does not constitute an attempt to desert, but only preparation with intent to commit the offense (30-1514) (40-416 [1]).

44. A prisoner who runs away from a sentry, but is immediately pursued and retaken, the escape not being completed, is not guilty of desertion, but only of an attempt to desert (30-1514) (40-416 [6]).

44a. Desertion cannot be a joint offense. Consequently the offense of joint attempt to desert cannot exist. But there may be a joint prosecution for conspiracy to desert (40-416 [16] [17]).

## VII. WAR-TIME DESERTION

45. As to the First World War, desertion during the period from April 6, 1917, to March 2, 1921, both dates inclusive, was "in time of war" (30-352, 2203) (40-416 [4]).

46. The so-called "Cuban Pacification" October 6, 1906, to April 1, 1909, was not a "war or rebellion" (30-2204) (40-503).

47. Within the field of operations of the expeditionary forces in Mexico in 1914-1916 it was "time of war" (30-2205) (40-416 [4]).

48. When the country is at war, but the theatre of operations is outside the territorial limits of the United States it is "time of war" at home as well as abroad (12-425).

49. If a desertion is committed in time of peace the supervening of war before the deserter surrenders or is apprehended does not



change the character of the offense or the extent of punishment—it is still a peace-time desertion (30-352, 1510) (40-416 [4]) (46-278).

50. Desertion and joining the enemy are distinct offenses (12-495), but a prisoner of war who enlists in the enemy's forces is guilty of desertion unless such enlistment is made under threat of death or extreme punishment, or was a possible means of obtaining freedom; but in such case the burden is upon the accused to show that his act was not desertion (12-400).

50a. An alien volunteer who is captured by the enemy and escapes to his own country (a neutral) and fails, when given a chance, to return to his command, is guilty of desertion. If caught in the United States he may be arrested and punished accordingly, but he cannot be apprehended in the neutral country except through diplomatic channels (40-416 [3]).

51. It is not necessary to allege that the offense was committed "in time of war". The court will take judicial notice of the fact if the date specified falls within a war-time period (30-1317) (40-416 [5]) (43-61). World War II began December 7, 1941; accordingly a desertion on December 8, 1941, was in time of war (45-486).

52. In a trial for war-time desertion evidence of prior and separate unauthorized absence of accused while the company was engaged with the enemy is proper as bearing upon the motive or design which actuated the commission of the offense charged (30-1515) (40-395 [7]).

53. A dishonorable discharge for war-time desertion entails the forfeiture of all rights of citizenship, including the right to become a citizen, and forever bars the subject from holding any office of profit or trust under the U. S. government (30-271, 685, 686) (40-154 [1]). Such disabilities may be removed, through the pardoning power of the President, but it has been held that a pardon by the President is ineffectual to remove a disqualification under a State law (12-834) (40-154 [2]). But see par. 72 this Annotation.

### VIII. DRAFTED MEN

54. Under the law in force in 1918 any person registered for military service who, upon being ordered by the local board or the State Adjutant General to report for military service, failed to report at the time and place specified and intentionally remained absent, was chargeable with desertion (30-2232) (40-416 [18]).

55. In the Selective Training and Service Act of 1940 (Secs. 3 a and 11), and the new Selective Service Regulations (Vol. I par. 117) a drafted man is not subject to military law and cannot be tried for the military offense of desertion until he has been accepted for, and inducted into, the military service by the military authorities at an "induction station". Any offenses or delinquencies of which he may

be guilty under the selective service law prior to such induction are punishable by the United States civil courts (Sel. Tr. & Ser. Act, 1940, Sec. 11) (M. L. U. S. 2225). See Art. 109, Anno., par. 3a.

56. Under the old law it was held that in a trial by court-martial for "draft desertion" or "desertion from the draft" (*i.e.*, failure to report for military duty when so ordered) the burden was upon the prosecution to prove "induction". But when the accused was tried for desertion or other offense committed after he had reported for military duty he stood like a man voluntarily enlisted and if he asserted that he was not properly in the service the burden was upon him to prove his nonamenability to the military jurisdiction (30-2234) (40-416 [19]). Under the present law, as noted in the preceding paragraph, the military jurisdiction does not vest until induction into the military service, and such induction cannot be accomplished until the man reports in person. Practically all of the difficulties which were experienced in proving induction under the old law (30-2223 *et seq*) (40-416 [19] [20] [21]) are now eliminated as it will seldom, if ever, be necessary to prove induction. But see Art. 2, Anno., par. 13.

57. Should it become necessary in a given case to inquire into the processes of selection for military service, it has been held that the proceedings of draft boards are entitled to the presumption of regularity which attaches to the acts of public officials generally, and a court-martial is not required or authorized to go behind their actions or orders unless some irregularity appears on the face of the record (30-2238) (40-416 [19]).

58. Soldiers of the emergency forces during the First World War were not mustered out by organizations, but individually; furthermore, the Joint Resolution of Congress approved March 3, 1921 (41 Stat. 1359) terminating the emergency, provided that nothing therein contained should be construed to terminate the military status of any person then in desertion. It was accordingly held that an enlisted man who abandoned the service shortly before his regiment was demobilized was not discharged, but should be dropped from the rolls as a deserter (30-173, 182).

## IX. NATIONAL GUARD AND VOLUNTEERS

59. A deserter from a volunteer regiment is amenable to trial and punishment by an Army court-martial notwithstanding the fact that his own regiment has been mustered out of Federal service (12-415).

60. A member of the National Guard whose enlistment had expired but who, nevertheless, entered into Federal service with his organization when it was drafted and served from August to November, 1917, was held to be constructively enlisted and punishable for desertion (30-348) (40-467).

61. A member of the National Guard drafted into Federal service with his unit and honorably discharged therefrom, is not, by such discharge, relieved from amenability for a prior desertion from another National Guard unit in Federal service under call of the President (30-1499) (40-369 [4]).

62. A member of the National Guard who failed to report when his organization was drafted into Federal service and later enlisted in the U. S. Naval Reserve Force was held to have violated Article 28 (Certain Acts to Constitute Desertion) and to be guilty of desertion from the Army (30-1502) (40-1302 [2]).

63. A member of the National Guard who failed to report for duty in Federal service with his organization, and later was appointed and served as an officer in the National Army was held technically to be a deserter from his National Guard organization, but that under the circumstances of the particular case he should be considered as having been constructively pardoned (30-175) (40-p. 996).

## X. PUNISHMENT

64. If a deserter is arrested by the civil authorities for a civil offense and discloses his identity as a soldier to escape punishment for the civil crime, his desertion is regarded as terminated by apprehension (30-Sup. 1510) (40-416 [15]).

65. In the absence of proof as to the manner of return to military control, it is to be presumed, for purposes of punishment, that the accused surrendered himself (30-1510) (40-416 [15]) (43-270, 271). An accused was charged with desertion terminated by being "apprehended at Philadelphia, Pa." By exceptions and substitutions the court convicted him of desertion terminated when he was "placed in confinement at Camp Dix, N. J." There being no finding as to whether accused surrendered or was apprehended, it was held that the maximum punishment fixed for desertion terminated by surrender would apply (43-98) (47-237, 238). This offense was committed January 15, 1942. By Executive Order 9048, February 3, 1942, all limitations on punishments for desertion were suspended (42-17). By Executive Order No. 9683, Jan. 19, 1946, the limitations upon punishments for violations of Arts. 58, 59, 61 and 86 (which had been suspended during the war) were restored except as to offenses committed in occupied enemy territory; and by Executive Order No. 9772, Aug. 24, 1946, such limitations were also restored in occupied enemy territory (M.C.M. 117c).

66. The phrase "not more than 6 months in the service" at time of desertion, as used in the executive order limiting punishments, refers to all military service of the accused, whether in his current or prior enlistments (30-1510) (40-416 [15]).

67. The punishment for a desertion consummated in time of peace but continued in time of war is limited as prescribed for the offense in time of peace (30-1510) (40-416 [4]).

68. A deserter forfeits all pay and allowances due at the date of his desertion by reason of his breach of the enlistment contract, but such forfeiture does not include any amounts due him under a prior enlistment from which he was honorably discharged (30-1879) (40-997). (But see Art. 45, Anno., par. 10b, citing M.C.M. 116g).

69. The collection from a deserter of a reward for his apprehension (if authorized) is an administrative matter independent of punishment and should not be included in the sentence. It is not collectible in any event unless accused is convicted of desertion (12-406, 407).

## XI. CIVIL DISABILITIES

70. Under present Federal statutes there are no civil disabilities attached to the crime of desertion unless the offense be committed in time of war (See VII, 53, above). (40-154 [1]).

71. Civil disabilities imposed by statute as incident to desertion can be incurred only upon conviction of desertion by a court-martial, duly approved. Such disabilities may be removed by pardon; but whether a convicted deserter may vote in state elections depends upon state laws (12-417, 418, 834; 40-154 [1]).

72. Remission of the unexecuted portion of a sentence imposed for war-time desertion, and the restoration of the soldier to duty, do not restore his citizenship rights. Such rights may be restored only by an unconditional pardon by the President (30-Sup. 686) (40-154 [2]). But under a recent statute (Pub. Law 221, 78th Congress, approved Jan. 20, 1944) no loss of civil or political rights results from a conviction of war-time desertion unless the person is dishonorably discharged; and all civil and political rights lost through war-time desertion are automatically restored by the deserter's restoration to active duty with the military or naval forces in time of war, or his reenlistment or induction in time of war, with permission of competent authority (44-17).

73. Citizenship forfeited by a deserter in time of peace, under a former statute, may be restored by Presidential pardon (30-Sup. 686) (40-154 [2]).

74. If a deserter is restored to duty without trial, or is tried and convicted and serves his sentence in full or as remitted, and finishes his enlistment and receives an honorable discharge therefrom he is not liable to any civil disabilities (12-434).

• • • •

**ARTICLE 59. ADVISING OR AIDING ANOTHER TO DESERT.** *Any per-*

*son subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct. (See M.C.M. 147).*

#### ANNOTATION

1. A declaration by one soldier to another of a willingness to desert with him in case he should decide to desert is not an "advising" to desert in the sense of this Article (12-131).

2. To constitute the offense of "advising to desert" it is not essential that there should have been an actual desertion by the party advised; but to complete the offense of "persuading to desert" the persuasion must have induced the act. (12-131).

3. Giving shelter to a deserter after his desertion was complete is not a violation of this Article. The offense of harboring a deserter is separate and distinct from, and not included in, a charge of assisting one to desert (40-417) (see Article 60).

\* \* \* \*

*ARTICLE 60. ENTERTAINING A DESERTER. Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct. (See M.C.M. 148).*

#### ANNOTATION

See Art. 59 (Advising or Aiding Another to Desert) Annotation, par. 3.

\* \* \* \*

*ARTICLE 61. ABSENCE WITHOUT LEAVE. Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct. (See M.C.M. 149).*

## ANNOTATION

|   | Pars.  |
|---|--------|
| I. IN GENERAL .....                             | 1-6a   |
| II. ABSENCE IN HANDS OF CIVIL AUTHORITIES ..... | 7-9    |
| III. RESTORATION TO DUTY WITHOUT TRIAL ..       | 10     |
| IV. FORFEITURE OF PAY .....                     | 11-12  |
| V. OTHER OFFENSES INVOLVED .....                | 13-17  |
| VI. PROOF .....                                 | 18-22a |
| VII. COMPUTATION OF PERIOD OF ABSENCE ....      | 23     |
| VIII. SENTENCE .....                            | 24-28  |

## I. IN GENERAL

1. When absent without leave for any cause a soldier is under obligation to return at the earliest opportunity, and if he does not endeavor to do so the mere lapse of time operates to establish the intent which, coupled with the unauthorized absence, ripens the offense into desertion (12-15).

2. If while absent without leave a soldier incurs a disability which prevents his return, his status of absence without leave is not changed; and a soldier who goes absent without leave from a hospital and does not return to his organization, and is prevented by sickness from returning, continues absent without leave (12-15).

2a. A general prisoner, under a suspended sentence of dishonorable discharge, escaped from confinement at a Disciplinary Training Center overseas 1 September 1943. After wandering around for three weeks he was wounded and admitted to a station hospital 21 September 1943, where he gave his name and former unit correctly, but did not disclose his true status as an escaped prisoner. After discharge from the hospital he was assigned to several different units until he was injured playing base ball 19 May 1944, and was admitted to another hospital where he was apprehended, and returned to confinement on 18 June 1944. He was subject to military control continuously from 21 September 1943 to 18 June 1944. Held: Even though he returned to military control on 21 September 1943, he continued to be "absent without authority" because he concealed his true status as an escaped general prisoner. Consequently he was in escape from 1 September 1943 to 18 June 1944 and this entire period is to be excluded in determining the duration of the sentence from which he escaped (45-10). The offense of absence without leave in violation of this Article cannot be committed by a general prisoner who has been dishonorably discharged because he has no place of duty, "command, guard, station or camp" (46-93). The proper charge in such case is escape in violation of Article 69.

3. Capture by the enemy while absent without leave restores the soldier to a duty status (12-15).

4. One absent without leave who reports to a quartermaster for transportation back to his post does not thereby change his status as absent without leave (12-15). By reporting to any station other than his own for transportation to his proper station a soldier, if absent without leave, remains so until he arrives at his proper station, or until his absence is authorized by competent authority or he is taken into custody by the military authorities (30-1858) (40-p. 887, 995).

5. The status of absent without leave ceases when the soldier returns, or is returned, to military control, and when a soldier who is absent without leave "turns himself in" at any station, including a recruiting office, and is given an order and transportation to return to his proper station, he is thereby "returned to military control" (30-1858, Sup. 35 a) (40-p. 995).

5a. Deserters who surrender to the Naval authorities and are subsequently returned to the Army authorities are not "returned to military control" until they are turned over to the Army (42-251). The same rule applies to a soldier apprehended or detained by the civil authorities. Entries on administrative records showing detention by naval or civil authorities should be followed by an entry showing the date of return to military control (44-9).

5b. When a soldier, while absent without leave, is taken to a civilian hospital because of an injury for which an operation is necessary, and the operation is authorized by the commanding officer of an Army post, the soldier is thereby returned to military control thus terminating his absence without leave (43-354).

6. The proper station of a soldier absent without leave, with respect to the amount chargeable to him for transportation back thereto, is the station where the soldier's organization is then serving. If that station has been changed while the soldier was absent, the new station is the proper one (12-15). An acquittal by court-martial of a charge of absence without leave affects only the disciplinary aspects of the case, and does not prevent an administrative determination that he was in fact absent without leave and properly chargeable with the cost to the Government involved in his return (44-307).

6a. A "Post Stockade" is a military "Station" within the meaning of the term as used in this Article, and a specification for absence without leave "from the Post Stockade at Fort . . . . . ." is sufficient (44-379).

## II. ABSENCE IN HANDS OF CIVIL AUTHORITIES

7. A soldier absent in the hands of the civil authorities is absent without leave, but final determination of his status should await the disposition of the civil case, when the absence may, in a proper case,

be excused (12-14). Discharge by the civil authorities without trial will not always excuse the absence. Thus a soldier who was arrested by the civil authorities for seduction, and, while in arrest, married the girl whom he was charged with having seduced and thus escaped prosecution for the seduction, was, nevertheless, held to be absent without leave while under detention by the civil authorities although he was eventually discharged without trial (30-1866) (40-p. 888).

8. When a soldier is surrendered to the civil authorities upon proper process (see Article 74) he is not liable to prosecution for absence without leave during the time he is away being tried or serving sentence; but when a soldier, while absent *with* leave, is arrested by civil authorities, tried and convicted, and is thus prevented from returning at the expiration of his furlough, he is absent without leave from the date of such expiration. If not convicted of any offense by the civil authorities his absence while in their hands, is, generally, excusable (12-15).

9. A soldier who, while absent without leave, is arrested by the civil authorities and held to serve a sentence imposed by a civil court, upon release from which, and before he has an opportunity to return to his station, is again arrested and held by the civil authorities upon another charge of which he is eventually acquitted, is to be regarded as absent without leave during the second period of detention as well as the first (30-1863) (40-p. 887).

### III. RESTORATION TO DUTY WITHOUT TRIAL

10. The authority to excuse an unauthorized absence is vested in the officer who would have had power to grant the leave (12-14, 15), and restoration to duty without trial is a bar to a subsequent trial for absence without leave, but does not change the soldier's status as having been, in fact, absent without authority (12-16, 17).

### IV. FORFEITURE OF PAY

11. Forfeiture of pay while absent without leave accrues independently of the results of a trial for the military offense involved. Thus, while the soldier may not be punished by court-martial for an absence without leave, if he was in fact so absent, he forfeits his pay for the period involved (12-16).

12. The liability to forfeit pay may be determined administratively and independently of the result of court-martial trial, even when there has been an acquittal (30-1795, 1857) (44-307). So also in the case of absence due to drunkenness (30-1796) (40-p. 887, 888).

### V. OTHER OFFENSES INVOLVED

13. If a soldier goes absent to evade some particular duty he may



be tried for absence without leave and also under the 96th (General) Article for his evasion of the specific duty (12-127).

13a. Absence without leave under Article 61 and failing to report to a certain commander as ordered under Article 96 are separate and distinct offenses (42-159).

13b. When an accused was charged with absence without leave from March 19 to April 10 and the court, by exceptions and substitutions, convicted him of two separate offenses, (1) from March 19 to April 1, and (2) from April 1 to April 6, it was held that the accused legally could not be convicted of two offenses when he was charged with only one, and that only so much of the findings as involved the first period could be approved (43-380).

14. Any unauthorized absence from a post of guard by a member of the guard constitutes an absence without leave (12-128). But "failure to repair at the fixed time to the properly appointed place" is not included in a charge of absence without leave from station (40-419 [3]).

14a. Failure of an officer to attend an officers' meeting, notice of which had been posted on the bulletin board which all officers were required to read daily, was held a violation of this Article, although accused denied that he knew of the meeting. Specific intent is not an element of the offense here involved (44-233).

15. Absence without leave is a lesser included offense in desertion, and if tried for desertion, and acquitted without reservation, a soldier is acquitted of the absence without leave; and if convicted of the lesser offense only, he is, in law, acquitted of the greater (12-415, 416). The same is true where the offense specified is that of leaving station without authority and reporting at another, under Article 28 (30-1438) (40-416 [12]).

16. Removal of a charge of desertion does not bar trial for absence without leave (30-179) (40-p. 997).

17. Absence without leave is also a lesser included offense in a charge of misbehavior before the enemy under Article 75 if the specification is so drawn as to charge an unauthorized absence for a definite period (30-1438) (40-433 [3]).

## VI. PROOF

18. The original morning report, or a duly certified extract copy, is competent evidence to prove absence without leave when it contains original positive entries of the fact pertaining to the accused as of the date or dates alleged. But entries on a morning report which merely recite information received from outside sources and not within the immediate knowledge of the officer responsible for the correctness of the record, are not competent evidence (30-1440) (40-395 [18]); and

entries upon a document which is not an original record, such as a payroll or service record, are not competent evidence (30-1441) (40-395) [19]) (42-212, 213). An extract copy of the morning report which fails to show the dates of the initiation and termination of accused's absence without leave has no probative value to show such dates (47-235). But see Art. 37, Anno., par. 59, and M.C.M. 130c.

18a. Entries in morning reports are only prima facie evidence of the facts they recite. It is always pertinent to inquire whether the person who made the report, and was responsible for its correctness, had personal knowledge of the facts recited. When it is manifest that the entries were not based upon personal knowledge of the person who made or authenticated them such entries are not competent evidence of the facts stated and are mere compounded hearsay. Even though the report is not objected to, or defense counsel expressly states that he has no objection, it may properly be questioned (44-337, 338) (45-86-88). See Article 37, Anno., par. 59. The commanding officer is the responsible "maker" of the morning report. The fact that the clerk who prepared it has no personal knowledge of the facts entered therein is immaterial. It is sufficient that the commanding officer has personal knowledge of its correctness, and, in the absence of evidence to the contrary, the usual presumption of regularity is applicable (45-127) (46-91, 92). More recently, however, the Federal statute (M.L.U.S. 755a) relating to writings or records kept "in the regular course of business" has been applied to morning reports. That statute provides in substance that such writings and records shall be admissible "in any court of the United States and in any court established by Act of Congress" as evidence of "any act, transaction, occurrence, or event" shown thereby, and that "lack of personal knowledge by the entrant or maker may be shown to affect its weight but shall not affect its admissibility" (47-172-174) (48-17-20, 130, 131). See also M.C.M. 130c.

19. The testimony of a sergeant that the records of the company show that accused was absent without leave on certain dates is incompetent. The records themselves, or duly authenticated copies, should be produced (30-1444) (40-395 [25]).

20. The fact that the absence was "without proper leave" must be both alleged and proved. The testimony of noncommissioned officers that the accused was not present with the company on certain dates does not prove that he was absent without leave, there being no evidence that he did not have authority to be absent (30-1444, 1445) (40-419 [1] [2]) (46-335). A variance between allegation and proof as to the particular "command" from which accused absented himself is harmless. The gravamen of the offense is absence without leave "from command" (i.e. military control); this being established, and there being nothing to show that accused was prejudiced by such variance, a conviction will stand (44-9, 10).

21. The testimony of an officer of the organization that it was reported to him by the First Sergeant that the accused was absent without leave is hearsay, and in the absence of direct evidence of the unauthorized absence, or an admission thereof by accused, is insufficient to support a conviction (30-1439, 1444) (40-395 [21]). The sergeant himself might have given competent evidence of the fact if it was within his personal knowledge. Noncommissioned officers, under certain circumstances, may be presumed to have knowledge of such matters, but no such presumption ever attaches to a private soldier (30-1439) (40-395 [23]) (43-307, 308).

22. Absence without leave may be proved by circumstantial evidence as when a soldier had been refused a pass and, while absent, produced no authority except a furlough which he had forged (30-1444); also when accused testified that he went absent because he had not been paid, and intended to join a brother in another organization (40-419 [2]).

22a. Whether a soldier, absent on pass, with permission to go anywhere within a radius of fifty miles from his post, who goes beyond the limits of his permission, but returns to the post within the time limit of his pass, is chargeable with absence without leave under Article 61 or Article 96, depends upon the circumstances. His physical presence at a place far beyond the limits of his pass might evidence an abandonment by him of the authority for his absence, and render him liable under Article 61; but when the violation of limits is not of such nature as to show complete abandonment of such authority, he is properly chargeable under Article 96 for a violation of the terms of his pass, rather than absence without leave (44-419, 420).

## VII. COMPUTATION OF PERIOD OF ABSENCE

23. In computing the period of absence without leave for the purpose of determining the maximum punishment where a fraction of a day is involved, a continuous period of absence that totals not more than 24 hours is counted as a day; any such period that totals more than 24 hours and not more than 48 hours is counted as two days, etc. The hours of departure and return on different dates are assumed to be the same if both are not found (M.C.M. 117c) (46-278, 279).

23a. The status of absence without leave terminates when the absentee is returned to military control, whether his return is voluntary or by apprehension (45-277) (46-204).

## VIII. SENTENCE

24. Under a charge of absence without leave for less than 60 days, when the penalty is limited by the number of days' absence (M

C. M. 117), no greater sentence can be imposed than that authorized for the number of days' absence alleged although the court, by exceptions and substitutions, finds the accused guilty of a longer period (30-1443).

25. When an accused is convicted under two specifications, *viz.* (1) absence from guard duty, and (2) absence without leave, the first is included in the second and he may not legally be punished in excess of the maximum allowed for the absence without leave as charged in the second specification (30-1443).

25a. In a conviction of absence without leave from guard, when neither the specification, the evidence, nor the findings indicated the length of time the accused was absent, it was held that the sentence could not exceed the maximum authorized (M.C.M. 117c) for the lowest bracket, *viz.* absence from guard for not more than one hour (42-105).

25b. The offense of "leaving his duty as a special guard before being regularly relieved" under Article 96, not being charged as the offense of a sentinel (Article 86) is most closely related to the offense of absence without leave from guard under Article 61 and punishable accordingly (43-427, 428).

26. In the case of an officer a sentence of dismissal has been held to be authorized for an absence without leave for four days after his having been refused leave for the reason that "his organization was practically under orders for departure overseas" (30-1442) (40-419 [2]).

27. Absence without leave is not a "continuing offense" (43-10). The offense is complete at its inception, although the status of being absent without leave continues until the absentee returns, or is returned, to military control (44-9).

28. Penitentiary confinement for this offense is not authorized (43-308). See Article 42 (Places of Confinement).

## CHAPTER XII

### PUNITIVE ARTICLES—DISRESPECT; INSUBORDINATION; MUTINY

*ARTICLE 62. DISRESPECT TOWARD THE PRESIDENT, VICE-PRESIDENT, CONGRESS, SECRETARY OF WAR, GOVERNORS, LEGISLATURES. Any officer who uses contemptuous or disrespectful words against the President, Vice-President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct. (See M.C.M. 150).*

#### ANNOTATION

1. Contemptuous or disrespectful words against the President, or the government as represented by him, when deliberately used, whether spoken in public, published, or contained in a communication designed to be made public, have repeatedly been the subject of charges under this Article; but mere adverse criticisms uttered in political discussions, though couched in intemperate language, but not apparently intended to be disrespectful to the President personally, or to his office, or to excite animosity against him, are not generally regarded as violations of this Article (12-120, 121).

\* \* \*

*ARTICLE 63. DISRESPECT TOWARD SUPERIOR OFFICERS. Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct. (See M.C.M. 151).*

#### ANNOTATION

|                                   | Pars. |
|-----------------------------------|-------|
| I. IN GENERAL .....               | 1-2a  |
| II. OTHER OFFENSES INVOLVED ..... | 3-3a  |
| III. ALLEGATIONS AND PROOF .....  | 4-5   |

## I. IN GENERAL

1. The offense may consist of acts or words, but disrespectful language by a soldier in regard to his commanding officer uttered while the soldier is on detached service should be charged under the 96th (General) Article (12-487).

2. Disrespectful and insubordinate behavior in connection with refusal to obey an illegal order may be punishable under this Article although the refusal to obey the order itself is not punishable under Article 64 (30-1521) (40-421 [2]) (42-363).

2a. Disrespectful language addressed to an officer evidently recognized by the accused as his "superior officer," he having addressed him by his title, is not a violation of this Article as to other officers present when there is no evidence that accused so recognized them (43-339).

## II. OTHER OFFENSES INVOLVED

3. Disrespect towards a superior officer under this Article is not a lesser included offense in a charge of using provoking language to an officer in violation of Article 90 (30-1521) (40-448). Being drunk and disorderly in violation of Article 96, and assault or disobedience under Article 64, are not included in a charge of disrespect under Article 63 (40-421 [3]).

3a. The offenses of disrespect denounced by this Article and willful disobedience under Article 64 are separate and distinct, and the latter is not a lesser included offense in the former (42-18). But the offense of disrespect toward a superior officer in violation of this Article is a lesser included offense in a charge of causing a mutiny under Article 66 (44-187).

## III. ALLEGATIONS AND PROOF

4. The particular acts or words relied upon should be set forth in the specification at least in substance (12-487). The fact that spoken words are obscene or profane is not a sufficient reason for omitting them (30-1521) (40-421 [1]).

5. Where the specification alleged disrespect toward certain named officers of a command, and the court, by exceptions and substitutions, convicted accused of disrespect toward officers of the command, omitting names, the variance was held fatal, the accused having been convicted of an offense other than that charged (30-1521) (40-421 [4]).

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**ARTICLE 64. ASSAULTING OR WILFULLY DISOBEYING SUPERIOR OFFICER.** *Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon*

*or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.* (See M.C.M. 152).

### ANNOTATION

|                                   | Pars.  |
|-----------------------------------|--------|
| I. IN GENERAL .....               | 1-1C   |
| II. ASSAULT .....                 | 2-2a   |
| III. DISOBEDIENCE .....           | 3-13   |
| IV. OTHER OFFENSES INVOLVED ..... | 14-16a |
| V. ALLEGATIONS AND PROOF .....    | 17-21  |
| VI. JURISDICTION .....            | 22-24  |

### I. IN GENERAL

1. The "superior officer" here referred to need not be the commanding officer of the accused (12-121), but accused must know, or have reason to know, that he is an officer superior to him, and it must appear that such superior officer was at the time "in the execution of his office" (12-539). It is the military duty of an officer to issue orders to prevent a flagrant breach of military discipline which he sees about to be committed, whether he is the offender's commanding officer or not, and the refusal of a soldier to obey such an order is a violation of this Article (43-271).

1a. A prisoner, working alone outside the guard house under instructions to speak to no one except in the line of duty, was approached by an officer who had no official relation to him who persisted in forcing accused to engage in a conversation upon a purely personal matter. After accused had respectfully declined to talk to the officer, an altercation arose in which accused struck the officer, and was subsequently tried and convicted of "striking his superior while in the execution of his office" under this Article. It was held that, under the particular circumstances the officer was not "in the execution of his office" within the purview of this Article and that the record was legally sufficient to support only so much of the findings as involved assault and battery under Article 96 (42-18).

1b. In a prosecution for willful disobedience of an order under this Article the accused must know that it was given by an officer who had authority to give it (M.C.M. 152b). Although the Article does not expressly make knowledge by the offender of the official status of the person giving the order an element of the offense, such knowledge is a necessarily implied requisite in the absence of which a conviction cannot be sustained (42-18).

1c. A dishonorably discharged general prisoner confined at a Disciplinary Barracks was guilty of offering violence to the officer in

charge of housing, feeding and discipline of the inmates. Held: The officer concerned was accused's "superior officer," and as accused was a person subject to military law (Article 2 [c]) his conviction under Article 64 was sustained (44-233). A prisoner of war who is alleged to have struck or disobeyed an officer having custody or supervision of the accused may be charged under this Article (45-329). (See Art. 2, Annotation, par. 28).

## II. ASSAULT

2. The words "on any pretext whatsoever" as here used, do not preclude legitimate self-defense (30-1446) (40-422 [1]). But in order to justify an assault on a superior officer on the ground of self-defense, it must be shown that there was an actual or apparent necessity for the use of force in self-protection (44-282).

2a. A commanding officer in the field is constantly on duty and "in the execution of his office." A soldier who assaults his commanding officer when the officer is in bed in his quarters in camp is chargeable under this Article (40-422 [1]).

## III. DISOBEDIENCE

3. There must be a willful refusal or neglect to comply with a specific order to constitute a violation of this Article. Mere failure to perform routine duty is chargeable under the 96th (General) Article (12-121). The "command" here contemplated is an express and personal one as distinguished from one of general scope issued to the command as a whole (30-1463) (40-422 [5]). The action of a reviewing authority in confirming and ordering executed the sentence of a summary court-martial of an accused to hard labor for thirty days does not constitute a direct personal order from such reviewing authority to the accused upon which to base a conviction under this Article (48-134, 135).

3a. The gravamen of the offense of disobedience under this Article is an "intentional defiance of authority." A rational mental process is involved in willful disobedience, and when it is shown that the accused was so drunk as to be incapable of any specific intent, he cannot be convicted of disobedience under this Article, but may be found guilty under Article 96 of the lesser included offense of failure to obey an order (42-159-163).

3b. An accused was ordered by his commanding officer to get his pack and turn out for a practice march. Accused stated that he had a certificate from a medical officer exempting him from the march, and argued about the matter with the officer and several noncommissioned officers for several minutes, but finally put on his pack and fell in for the march. Held that accused's conduct was not a viola-



tion of Article 64. It was not such a defiance of authority as to constitute willful disobedience (43-186).

3c. Mere slowness in obedience to an order is not a violation of this Article when promptness is not of the essence of the command (43-308). But when an accused was ordered to report immediately at a certain place and, instead of reporting at once, went to the bank and then back to his quarters where he was placed in arrest an hour and a half later, it was held that his unconscionable delay when ordered to report immediately involved all the elements of willful disobedience (43-380, 381). An accused, when given an order by his superior officer to report to another officer for duty at one o'clock that day, replied that he was not going to report, but would be around if wanted. Before one o'clock the officer who had given the order had accused placed in confinement. He was charged with wilful disobedience under Article 64, and the court convicted him of refusal to obey under Article 96. Held: Accused could not disobey or "refuse to obey" the command by non-compliance therewith until the time for performance had arrived, and at that time performance was made impossible by his confinement. Conviction disapproved (44-340, 341).

3d. Accused's superior officer told him he would "have to be mess sergeant." He expressed unwillingness, and was told that he was the senior noncommissioned officer available for the position, and that he should take the job and do the best he could. Later the officer told him that refusal to assume the duties would result in reduction to private and trial by court-martial, but he was not told what the charges would be, and accused understood that court-martial proceedings were necessary for a reduction in grade unless for inefficiency. Accused did not assume the duties and was tried and convicted of wilful disobedience under this Article. Conviction disapproved because there was no proof that accused was given a definite, express, direct order. The accused justifiably believed that he had a choice of being mess sergeant or being reduced to private, and was not guilty of disobedience of a positive and deliberate character (44-282, 283).

4. The order must be a lawful one, otherwise the accused will be justified in disobeying it (12-121); but if of doubtful legality it is the soldier's duty to obey it, and if he refuses, and the order is in fact illegal, although he may not be chargeable under this Article, he may be charged under the 96th (12-122).

4a. An order to "double-time" given purely as a punishment is an illegal order (42-363) (43-237, 238). An order to "take a hike" as a punishment is illegal (44-102).

4b. Accused was in charge of the pits at a rifle range. He used disrespectful language to his commanding officer who placed him in

arrest and ordered him to his quarters. While he was waiting for transportation the commanding officer ordered him to resume command of the pits. Accused refused to obey because he thought that, being in arrest, he was prohibited from exercising command functions. He was tried and convicted of wilful disobedience in violation of this Article and the conviction was sustained. The order to resume control of the pits was legal. It removed any impediment existing as a result of the prior arrest as it was a constructive release from the arrest (44-380). See Art. 69, Anno., par. 17. An order given by a company executive to a soldier who was in arrest in quarters under charges, awaiting trial, to join his company at drill, said order being in accordance with a general order issued by the post commander that persons in arrest under charges awaiting trial would "train and not be kept in," was held to be a lawful order (45-278, 279).

5. An order is presumed to be lawful unless it is clearly and obviously illegal, and an inferior, in refusing to comply on the ground that it is unlawful, does so at his own risk. To justify such refusal the order must be palpably illegal, or one the execution of which would be criminal or involve injury or consequences of a serious character which could not be righted (12-539; 30-Sup. 1518) (40-422 [6]).

5a. A medical officer, on duty with a battalion on a 20-mile "hardening march," was ordered by the commanding officer to walk on foot. He did not give the commander any reason why he should not obey the order, but, being of the opinion that it would impair his efficiency in performance of his medical duties, he rode in a motor car. On the trial for willful disobedience several medical officers testified that compliance with the order would have seriously impaired accused's ability to perform his medical duties on the march. His conviction was sustained. Held, that a staff officer has no right to disobey an order because he considers it would impair performance of his staff duties (42-273, 274).

6. If an order is palpably contrary to the laws and usages of the military service, the fact that it was given by a superior to a subordinate does not justify the subordinate in carrying it out (30-1616).

7. The following have been held to be violations of this Article: Refusal of a soldier to comply with an order to pay a debt to the company tailor; refusal to cook for civilian teamsters in the military employ (12-121); failure to obey an order of the post commander to refrain, for a certain period, from driving a private automobile on the reservation by reason of the soldier's failure to register the vehicle in compliance with post regulations (30-1518); failure to obey a specific order to "go and drill as ordered by your officers" (30-1519) (40-422 [4] [6]).

7a. A flying officer was convicted of two offenses under this Article in willfully disobeying two specific orders to fly (1) as a

bombardier and (2) as a bombardier-navigator. He pleaded guilty but claimed in extenuation that he was afraid to fly. He had expressed fear of flight before, but there was no evidence of any nervous or mental disorder which would incapacitate him as a flying officer. He had credit for one hundred hours flying time, and had not expressed any fear until after he was informed that he was assigned to combat duty abroad. Conviction sustained (43-380).

7b. When a soldier first refuses to obey an order of a noncommissioned officer, and when the matter is reported to the company commander is given the same order by the officer which he also refuses to obey, he is chargeable under this Article unless it affirmatively appears that the officer's order was given for the sole purpose of increasing the penalty (43-426). Disobedience of an order which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this Article (45-14).

7c. A direct order to a soldier, who is able to do so, to speak only the English language under stated conditions, is a lawful order if it has a reasonably direct and substantial relationship to military needs (44-346).

8. Whether refusal to obey an order to submit to inoculation against disease is chargeable under this Article is doubtful (12-121), but it would be chargeable under the 96th. See Article 96, Annotation, par. 7.

9. An order designating certain places as "off limits" for soldiers of a command is legal (12-266), but when of general application a violation of it would properly be laid under the 96th rather than the 64th Article.

10. In 1918 it was held that an alien enemy, who had filed his first papers for citizenship (which made him liable for military service) and was a member of the U. S. Army, who refused to obey an order to prepare for embarkation overseas, was amenable under this Article, notwithstanding the fact that orders had been issued prohibiting the service in Europe of soldiers in our Army whose naturalization had not been completed (30-1518) (40-422 [6]).

11. The following cases have been held not to constitute violations of this Article: refusal by an officer to sign a certificate as to facts of which he had no knowledge; refusal of a soldier to act as an officer's servant; refusal of a soldier to contract marriage (12-121, 122) (40-422 [6]). But an order to do "KP" duty in an officers' mess in the field on an isolated island in the Pacific where no civilian help was available was held to be a lawful order, refusal to obey which was a violation of this Article (45-278).

12. A military commander has no authority to prohibit a soldier

from marrying, and the violation of such an order does not constitute a military offense, but if there is any disorder or military neglect, such as absence without leave, involved, for this he may be tried (12-266), but not under Article 64. However, general orders prohibiting marriages of soldiers in a foreign country without the approval of their commanding general are valid, and a soldier who violates such orders may be punished therefor under Article 96. When a soldier takes the oath of enlistment (see Article 109) he, of necessity, surrenders some of his privileges as a citizen (43-429) (45-14).

13. An order affecting a military person becomes operative when he receives official notice of its existence and contents; if it be special to the individual it becomes effective when it has been served upon or received by him through the usual military channels. An order forwarded in the usual way to an officer's station is presumed to have been received by him unless he was absent, and if absent without leave, the receipt of the order at his station is constructive delivery to him (12-276).

#### IV. OTHER OFFENSES INVOLVED

14. A soldier who kills his superior officer may be tried by court-martial for violation of this Article and also by the civil courts for the homicide (12-122).

15. A simple breach of arrest in violation of Article 69 (Arrest or Confinement) is not so serious an offense as to warrant charges also being brought under Article 64 (Assaulting or Disobeying Superior Officer) for violation of the order of arrest (30-1517) (40-422 [5]).

16. The question whether unauthorized absence from roll call is an offense under (General) Article 96 or Article 64 depends upon the element of willful intent to disobey. Such offense, if properly a violation of Article 96 only, cannot be brought within the purview of Article 64 by giving the soldier a special order which it is expected he will not obey (30-1518) (40-422 [3]) (42-18).

16a. "Recklessly drawing a knife in the presence of his superior officer" and "being drunk and disorderly in uniform", in violation of Article 96, are not lesser offenses included in a charge of "wilfully drawing a knife against his superior officer" in violation of Article 64 (40-422 [2]). A violation of this Article is not included in a charge of disrespect under Article 63 (40-422) (42-18). But the offense of disrespect under Article 63 is included in a charge of offering violence under Article 64 (45-385). Mere threatening words do not constitute "an offering of violence" in the sense of this article (48-185).

#### V. ALLEGATIONS AND PROOF

17. In a charge under this Article for an assault upon an officer,

in which the officer was killed, it would be proper to include the words "thereby causing his death" as indicating the measure of violence used (12-488); and evidence that accused threatened to kill the officer and violently attempted to free himself from restraint to carry out his threat, would be admissible (30-1446) (40-422 [1]).

17a. A captain came upon a group of soldiers being "held at bay" by the accused who was threatening them with a loaded service rifle held at "low port." The captain stepped in front of the group, placing himself in the line of fire of accused's gun as he was holding it, and ordered the accused to surrender his rifle. Accused remarked that if he fired he would "take the captain with him," but did not move his position or rifle. The captain repeated the order, whereupon accused unloaded the gun and threw it to the ground. Accused was convicted of "lifting up a weapon" against his superior officer in violation of this Article. Held, that to constitute "lifting up" a weapon within the meaning of this Article there must be some physical attempt or menace of violence. Mere words are not enough. The accused did not make any menacing move or gesture toward the captain. Conviction disapproved (43-11). In order to constitute an offer of violence within the meaning of this Article the conduct of an accused must amount at least to an assault. Mere threatening words are not sufficient (45-385).

17b. When accused was charged with "drawing a weapon against his superior officer" and it was proved that he drew "a pistol" and fired a shot so that the bullet struck the ground about 18 inches from the officer's feet, it was held that the violation of this Article was clearly established (44-379).

18. A specification alleging disobedience of a written order should set forth the order *verbatim*, or at least state fully its substance (12-483.)

19. In a specification for disobedience of orders the officer whose order is alleged to have been disobeyed should be named, and in a case where this was not done and the evidence tended to show disobedience of two separate officers, the conviction was disapproved (30-1519) (40-422 [4]).

20. A material variance between allegations and proof as to the purport of the order which accused is charged with disobeying will be fatal to the proceedings (30-1520) (40-422 [5]).

20a. A slight variance between specification and proof as to the name of the officer who gave the command and the exact language used, is not a material variance if the officer is sufficiently identified as the one alleged, and the essence of the command alleged is proved (44-233, 234).

21. Proof of failure to obey a standing order will not support a

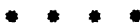
conviction of, nor is it a lesser included offense in, a charge of disobedience in violation of Article 64 (30-1520) (40-422 [7]).

## VI. JURISDICTION

22. The fact that the death penalty is authorized for a violation of Article 64 indicates that offenses thereunder are of a very serious nature and should properly be tried by a general court-martial. Charges for an assault under this Article cannot be tried by an inferior court for the reason that the death penalty is authorized even in time of peace (12-122, 123, 579). The penalty for disobedience of orders in time of peace is limited to dishonorable discharge, total forfeitures, and confinement at hard labor for five years (M. C. M. 117c). In time of war any charge under this Article must be tried by general court-martial (30-1320) (40-371 [1]). But see Art. 13 and M.C.M. 14.

23. Willful disobedience of a superior officer in violation of Article 64 is not punishable by confinement in a penitentiary (42-273).

24. There is no maximum limit of punishment prescribed by paragraph 117c M.C.M. for the offense of willful disobedience of an order under this Article in time of war (42-274). But, being a purely military offense, confinement in a penitentiary or Federal correctional institution is not authorized (43-340).



*ARTICLE 65. INSUBORDINATE CONDUCT TOWARD NONCOMMISSIONED OFFICER. Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or wilfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office or uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct. (See M.C.M. 153).*

## ANNOTATION

1. The provisions of this Article which are qualified by the phrase "while in the execution of his office," are, in application, limited to offenses committed within sight or hearing of the noncommissioned officer against whom the act or language is directed (30-1447) (40-423 [1]). This phrase is here used in the same sense as in Article 64 and comprehends every act done in the performance of official duty (30-1522) (40-423 [2]). This Article is limited in its application to soldiers. Willful disobedience of a noncommissioned officer by a general prisoner, with dishonorable discharge executed, is a violation

of Article 96 (47-66). But a prisoner of war is chargeable for such offense under Article 65 (45-329).

2. That a noncommissioned officer is acting "in the execution of his office" is not always presumable where he and the accused are members of the same organization. Each such case is to be determined upon its own particular facts (30-1522) (40-423 [2]).

3. The essence of the offense of using insulting language towards a noncommissioned officer is the insult to the office, not the affront to the person. Unless the noncommissioned officer is at the time acting "in the execution of his office" the insult is merely personal and not chargeable under this Article (30-1522) (40-423 [2]).

4. An assault upon a noncommissioned officer committed without knowledge of accused of his official status is not a violation of this Article, but may be charged under Article 96 (30-Sup. 1447) (40-423 [2]).

5. The words "noncommissioned officer" as here used do not include a person "acting" in that capacity. Refusal to obey, or an assault upon, an acting noncommissioned officer are chargeable under Article 96, and not Article 65 (30-Sup. 1447, 1522) (40-423 [2]).

5a. Refusal to obey an order of a noncommissioned officer, accompanied by a threat to use violence if attacked by the noncommissioned officer, without any actual attempt to assault him, is insubordinate conduct in violation of A.W. 65, but not an assault (40-423 [1]). And when, after being slapped by a sergeant, the accused raised a chair, it was held not inconsistent with a proper attitude of self-defense and did not amount to a threat to assault the sergeant (40-Sup. 423 [1]).

6. Failure to obey an order under Article 96 is included in a charge of willful disobedience under Article 65 (42-159-163). A soldier who refuses to obey an order given him by the first sergeant and subsequently refuses to obey the same order given him by his commanding officer may be punished under Article 64 (Willful Disobedience of Superior Officer) instead of Article 65 unless it appears that the officer's order was given for the sole purpose of increasing the penalty (43-426).

7. Two garrison prisoners were convicted of refusal to obey the command of a noncommissioned officer to "double-time" between two places. Held, that if such order was intended only as a punishment it was illegal (42-363). But in the instant case the entire command to which the prisoners belonged was engaged in a training program in which the men "had to double-time every place they went within the training area." An order given to expedite arrival at a certain place for good reason, or for training purposes, is lawful. Conviction sustained (43-237, 238).

*ARTICLE 66. MUTINY OR SEDITION. Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct. (See M.C.M. 154).*

#### ANNOTATION

1. Mutiny may be defined as concerted insubordination, or concerted opposition, defiance of, or resistance to, lawful military authority by two or more persons subject to such authority, with the intent to usurp, subvert, or override such authority or neutralize it for the time being. Persistent concerted disobedience, or refusal to do duty, presents an evidentiary case of mutiny (30-1550) (40-424). It is the intent to subvert, nullify, or neutralize for the time, the lawful military authority, which distinguishes mutiny from ordinary cases of disobedience (12-123). The intent to create a mutiny may be evinced by words, or it may be inferred from acts done, or from the surrounding circumstances (44-98). The concerted insubordination need not be preconceived, nor is it necessary that it be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders or to do duty, with an insubordinate intent (44-234). Prisoners of war may be charged under this Article in appropriate cases (45-329).

1a. When prisoners in a regimental stockade were yelling at a large crowd of soldiers who were yelling in reply, and the colonel of the regiment appeared and, pointing at the prisoner who was the leader of the disturbance, ordered the prisoners to go to their beds and the soldiers to go to their company areas, and all, except the leader, started to obey, but the leader recommenced the yelling and incited both prisoners and soldiers to violate the colonel's order, the leader was convicted of mutiny and the conviction was sustained (43-98).

1b. Two garrison prisoners were convicted of refusing to perform certain work in violation of Article 96. In fixing sentence the court regarded the offenses as analogous to mutiny. Held that the refusal of an individual on his own initiative to do something is not mutinous conduct. Mutiny involves some combination or concerted action; the fact that the two refusals were contemporaneous is not sufficient. The most closely related offense to the one here involved is failure to obey a lawful order (43-237).

1c. Mutiny and rioting are separate and distinct offenses, and the charging of both, based upon the same acts, is not a multiplication of charges (44-143).

1d. A noncommissioned officer of a work detail was convicted of causing a mutiny in violation of this Article. Several members of



the detail had refused to entruck when so ordered by the officer in charge. The officer then specifically ordered one of them to get on the truck. The man refused, saying he was sick. The officer then ordered the accused and another corporal to force the man on to the truck. When the man persisted in his protestations that he was sick, the accused dismounted from the truck and told the officer that he was not supposed to use force to get the man on to the truck. The colonel then came up and ordered the accused into arrest. Held: The evidence sustained only so much of the findings as involved a conviction of the lesser included offense of disrespect towards his superior officer in violation of Article 63 (44-186, 187).

1e. Several soldiers were refused passes, by their company commander, to go to town because they didn't have blouses. They went without passes in defiance of orders. Held: Not a sufficient defiance of authority to constitute mutiny (44-187).

1f. Joining in a mutiny is not a lesser offense included in a charge of exciting and causing a mutiny. To be guilty of "beginning or joining in" a mutiny, personal presence at the scene of the mutiny is necessary. But one may excite or cause a mutiny without taking part in, or being present at, the mutiny (44-513).

1g. Fifteen garrison prisoners refused to go to work. Their commanding general explained this Article to them and gave them until the next morning to consider the matter, explaining that if they still refused they would be punished. The prisoners discussed the matter. Three of them were silent as to their intentions. The next morning all, except the three, went to work. The three refused, each stating as his reason that he was afraid of shell fire. They were tried and convicted of mutiny. Held: The facts furnished ample basis for the inference that there was an express or tacit understanding between them to resist lawful authority (45-135).

2. Concerted refusal to obey an unlawful order is not mutiny (12-123).

3. In a case where a group of soldiers assaulted, cursed, and abused colored military police, and resisted their efforts to quell the disturbance, though the primary purpose of the offenders was to express resentment toward negro police rather than to override authority, yet it was held that their conduct showed a purpose to neutralize, for the time being, military authority as represented by the military police, and was technically mutiny (30-1550) (40-424).

4. When there was in fact no mutiny, but merely an attempt to create one, an accused cannot be convicted of joining in a mutiny (30-1550) (40-424).

5. Allegations describing generally the conduct of the several accused in a joint prosecution renders the charge of joining in a mutiny complete and intelligible, and allegations particularizing the acts of

each accused are not necessary; and it is not necessary to prove a previous deliberate plan (44-144, 145).

6. In a prosecution for an attempt to cause a mutiny, the proof must disclose some overt act of the accused with the specific intent to influence some one else to mutiny and proximately tending to, but falling short of, such consummation (44-150).

\* \* \*

*ARTICLE 67. FAILURE TO SUPPRESS MUTINY OR SEDITION. Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court-martial may direct. (See M.C.M. 155).*

*ARTICLE 68. QUARRELS; FRAYS; DISORDERS. All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer, nurse, band leader, warrant officer, field clerk, or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court-martial may direct. (See M.C.M. 156).*

#### ANNOTATION

1. This Article is merely an application to the military service of the common law principle that it is the duty of any citizen to stop any unlawful act being committed in his presence (12-124).

2. A civilian may be arrested without a warrant as well by a military person as by a civilian, when he commits a felony or breach of the peace in such person's presence. The person making such an arrest should use no unnecessary violence, inform the party of the cause of the arrest, and deliver him to the proper civil authorities as soon as practicable. If no civil official is immediately accessible, the person may be held, in the guard house if necessary, until such an official can be located, when he must be delivered to the civil authorities. He should not be held and the civil authorities merely notified (12-267). An officer pursued and apprehended a civilian who had stolen his private automobile, taking the culprit

into custody at the point of his pistol and informing him that he was going to deliver him to the police. When the culprit fled, the officer fired a shot into the air in an attempt to stop him but the thief continued his flight, and when he was about to vanish in the dark the officer shot and killed him. The officer was tried by court-martial and convicted of involuntary manslaughter, but the conviction was disapproved (48-82, 83).

3. The injury or death of a noncommissioned officer who, while absent without leave, is injured or killed while attempting to quell an affray between other soldiers and civilians—he having taken no part in the affray—is to be regarded as incurred in line of duty notwithstanding he was absent without leave at the time (30-467) (40-p. 972).

4. A lieutenant struck a private first class who was acting as a military policeman while the latter was trying to remove the officer from a fray. The lieutenant was convicted of a violation of this Article. Held that the record was sufficient to support only so much of the findings as included the offense of striking a military policeman in the execution of his duty in violation of Article 96. Article 68 does not apply to privates first class or military policemen (43-12).

5. Warrant officers are authorized by this Article to arrest persons subject to military law who engage in quarrels, frays, or disorders, and also, in common with other members of the armed forces, to arrest and hold for the proper authorities any person who commits in their presence a felony or a misdemeanor amounting to a breach of the peace (43-381).

6. Military policemen have no power to arrest a civilian for the unauthorized wearing of the Army uniform (See M.L.U.S. 2148). However, the arrest by military police of such civilian for misconduct which, if committed by a soldier, would constitute a violation of the Articles of War, would be legally justified if, under the circumstances (including the wearing of the uniform) there is reasonable and probable cause to believe that he is a person subject to military law, though it is later ascertained that he is not (43-481).

## CHAPTER XIII

### PUNITIVE ARTICLES—ARREST; CONFINEMENT

*ARTICLE 69. ARREST OR CONFINEMENT. Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct. (See M.C.M. 157). (See also A.W. 16).*

#### ANNOTATION

|   | Pars.  |
|---|--------|
| I. IN GENERAL .....                         | 1-10   |
| II. WHO MAY ORDER .....                     | 11-15  |
| III. ARREST—STATUS, LIMITS AND RESTRICTIONS | 16-19  |
| IV. BREAKING ARREST .....                   | 20-23a |
| V. ESCAPE .....                             | 24-31a |
| VI. RELEASE FROM ARREST OR CONFINEMENT ..   | 32-35  |

#### I. IN GENERAL

(See M.C.M. 19)

1. This Article does not affect the right of an officer to order a soldier into confinement when immediate restraint is necessary, which right has its source in long standing custom of the service and is recognized in Articles 71 (Refusal to Receive and Keep Prisoners)

and 72 (Report of Prisoners Received). It is not to be abused, however, and, if abused, the officer responsible is amenable to disciplinary action therefor (30-1241) (40-427 [1]).

1a. No person subject to military law shall be confined with enemy prisoners or any foreign nationals outside the continental limits of the United States. No accused in confinement awaiting trial shall be subjected to any punishments, other than confinement, prior to execution of sentence on pending charges against him (A.W. 16). Prisoners awaiting approval and execution of sentences will be distinguished from those serving sentences, and will be accorded facilities, treatment and training prescribed for unsentenced prisoners. They do not forfeit pay or allowances except pursuant to sentence ordered executed (M.C.M. 19).

2. The fact that the accused has not been placed in arrest or confinement, or that he has been released from restraint, is no bar to his trial (12-512).

3. An officer cannot, as a matter of right or privilege, demand that he be placed in arrest (12-481).

4. A soldier, extradited from a foreign country for a civil offense, cannot be detained by the military authorities and tried for desertion, the principle that a person extradited for a particular offense is exempt from trial for any other crime, being deemed applicable, although such other crime is a military offense (12-401).

5. A soldier on parole, or bail, from a civil court may be arrested and tried for a military offense (12-482).

6. An officer is not exempt from arrest by being, at the time, a member of a court-martial, but he cannot sit on a court-martial while he is in arrest (12-507).

7. A sentence of suspension from duty and pay does not imply confinement to quarters or involve a condition of arrest (12-265).

8. In making an arrest (*i. e.* taking a person into custody) as much force as is necessary may be used. If the arrest is resisted, even homicide may, under aggravated circumstances, be justified. Fetters or irons should not be used except when necessary to restrain the prisoner from violence or escape (12-480).

9. Military authorities are not empowered to make forceable entry into a private dwelling to arrest a soldier, but military arrests may be made in the public portions of public houses (12-480).

10. If a breach of arrest or escape is erroneously charged under (General) Article 96 the error does not constitute ground for invalidating the proceedings provided the specification and evidence show a violation of Article 69 (Arrest or Confinement) (30-1525) (40-394 [2]).

## II. WHO MAY ORDER

(See M.C.M. 20)

11. A trial judge advocate has no authority to place an accused in arrest or to compel his attendance before the court. These are functions of the proper commander (12-498) (M.C.M. 55). This does not affect the power of the trial judge advocate, as a commissioned officer, under Article 68, to restrain accused from committing a disorder (See paragraph 1 above).

12. Except under Article 68, only "commanding officers" have the power to place officers in arrest. The commanding officer thus authorized is the commander of the organization—regiment, separate company, detachment, post, department, etc.—in which the arrested officer is serving. When a company is included in the command of a post, the post commander, rather than the company commander, is the proper officer to place a subaltern of the company in arrest unless the company is part of a regiment serving at the post, in which case the regimental commander would be the proper commander to act (12-481) (42-325). The commanding officer of an Air Force Provisional Staging Squadron which is acting as an "independent unit," is authorized to place an officer of his command in arrest (44-283). In the absence of the "commanding officer" the ranking officer present and on duty is authorized to place an officer in arrest (44-341). But an arrest ordered by a "regimental officer" acting by authority of a regimental general order purporting to authorize him to make arrests, is illegal (45-135, 136) (45-282). The degree of restraint imposed upon an officer pending an investigation of charges, or pending trial, is a matter within the discretion of the officer competent to order the accused into arrest or confinement, and not for the determination of any subordinate commander. Breach of restriction (an offense in violation of Article 96) cannot be sustained when the restriction was imposed by a subordinate not competent to order the accused into arrest (47-298, 299).

12a. A warrant officer (except under Article 68—Quarrels, Frays, Disorders—or when in a position of command) does not have the authority of a commissioned officer to place enlisted men in arrest under paragraph 20, M.C.M., or this Article. He may, however, exercise the power in individual cases when acting by order, and in the name of, the commander (43-381).

12b. The commanding officer of an Army hospital is authorized administratively to restrict the freedom of action of a patient under his command, or even restrain him, provided such action is not taken as a punishment for disciplinary reasons, but is reasonably necessary to the proper care and treatment of such patient (44-84).

13. An officer may be placed in arrest by written or verbal order

from the authorized superior. The reason need not be stated (12-481), but see Article 46 (Charges; Action Upon) as to service of charges within a limited time. And the fact that charges are not promptly preferred, as required by Article 70, does not authorize the person in arrest to release himself (43-63).

14. Company or detachment commanders may delegate to non-commissioned officers the power to arrest or confine enlisted men in emergencies when it is impossible to obtain direct orders from the company commander or other superior, provided an immediate report be made to the proper commander who, if the arrest or confinement is continued, must confirm the act of the noncommissioned officer. This delegation of authority is not based upon the positive grant of authority to quell quarrels, etc., contained in Article 68 (12-272, 481).

15. The presumption of legality of arrest referred to in M.C.M. 157a extends to the grounds for the arrest and also to the authority to order the arrest (46-279).

### III ARREST—STATUS, LIMITS, AND RESTRICTIONS

(See M.C.M. 19b)

16. If the limits are not fixed, confinement to quarters is inferred, but the arrested person may go to mess and other necessary places. It is customary to fix the limits—ordinarily to the post (12-481). The limits of arrest are within the discretion of the authority exercising the disciplinary control in the case (30-1245) (40-427 [1]).

17. The status of being in arrest is inconsistent with duty, and placing an arrested officer or soldier in a full duty status terminates the arrest (12-480) (44-380). But while an officer in arrest cannot exercise functions of command, he is not necessarily exempted from the performance of administrative duties (30-1243) (40-427 [2]). And although assignment to duty may terminate the status of arrest, it does not constitute a constructive pardon or condonation of an offense for which charges are pending against him (43-133) (44-229, 342).

17a. A soldier in arrest in quarters under charges awaiting trial may be required to attend drill without terminating his status of arrest, when so directed pursuant to general orders of the post commander requiring all soldiers in a status of arrest to attend drills. In such case the limits of arrest are "enlarged by proper authority" (45-278, 279).

18. A soldier in arrest in quarters may be required to do cleaning or police work about his quarters (12-480), and he may be subjected to such restraint as may be necessary to prevent violence or escape (12-481, 482); when in confinement awaiting trial or the

result of trial he should not be required to wear distinctive clothing (30-1606) (40-p. 984).

19. An officer in arrest awaiting trial or the result of trial is entitled to pay (30-1798) (40-1443 [3]). A court-martial sentence to restriction does not become effective until the sentence is approved or confirmed, and ordered executed (44-289).

#### IV. BREAKING ARREST

20. It is not the practice to charge all breaches of arrest under this article. When a person in arrest has been given leave to go beyond the limits fixed and oversteps such leave for a brief period the offense should be laid under Article 96 (12-148). Breach of restriction in violation of Article 96 is a lesser included offense in breach of arrest under Article 69 (45-11).

21. Failure to obey an order to proceed to a certain place and report to a certain commanding officer in arrest is not chargeable under this Article, but should be laid under (General) Article 96 or Article 64 (Disobeying Superiors) (12-148).

22. An order in writing placing an officer in arrest is legally effective although in the interim between the issuing of the order and its service on the officer concerned the commander who issued it is relieved by another who does not revoke it (30-1241) (40-427 [3]).

23. Innocence of the charge for which a person is placed in arrest does not justify him in breaking his arrest (12-152).

23a. An officer was convicted of a breach of restriction in violation of Article 96. While under restriction he had received orders to prepare for transfer to another station. He thought this lifted the restriction and he left camp to get his watch which was being repaired. The conviction was sustained. Willful or wrongful intent is not an essential element of this offense. As in breach of arrest, proof of a *bona fide* mistake is admissible only in extenuation (43-342, 343).

#### V. ESCAPE

24. An escape is not complete until all restraint or pursuit is shaken off. So where an accused assaulted a sentinel, struck him down and started to run away but was immediately pursued and captured, never having been out of sight of his pursuers, it was held to be an attempt only (30-1524) (40-427 [4]). An attempt to escape (chargeable under Art. 96) is complete when accused commits an act which, in his mind, may enable him to escape, although, for reasons unknown to him, his escape actually is impossible (45-426).

25. A prisoner who runs away while out working without a sentry and under no physical restraint, although restricted to certain limits,



is not guilty of an escape under this Article (30-1524, 1455) (40-427 [6]). But proof that a soldier was confined in the guard house is *prima facie* evidence that he was in lawful confinement (40-427 [5]). Confinement must be proved by competent records or other first-hand evidence (40-395 [25]) (42-214).

26. A simple breach of restraint or parole is not an escape from confinement under this Article. It is a separate and distinct offense under (General) Article 96 (30-1455) (40-427 [6]). And breach of arrest is not included in a charge of escape from confinement (40-Sup. 427) (42-214) (43-426). Escape from confinement is not a lesser offense included in a charge of desertion (43-62).

26a. "Confinement" as used in this Article imports some physical restraint and does not include a case involving a mere general understanding that a soldier is not to leave (42-19) (44-59) (48-135).

27. But a paroled general prisoner who runs away and whose parole is thereupon revoked, becomes an "escaped general prisoner" (30-1619) (40-272).

28. Where a military prisoner escapes and is recaptured he must serve the unexecuted portion of his sentence. This is also true where the prisoner escapes during trial and the court thereafter sentences him to confinement which is approved and ordered executed: also when after sentence, and before approval, he escapes. The statute of limitations (Article 39) does not, in such cases, prevent the execution of the sentence from which the prisoner escaped (12-581, 582).

29. Where there is a conspiracy to effect a joint escape, and in furtherance of such conspiracy a sentry is assaulted by one of the conspirators, all are guilty of the assault; but this is not necessarily so unless there is a conspiracy (30-1310) (40-454 [24]).

29a. An accused (prisoner) was convicted of murder. The evidence showed that accused and another prisoner were going to breakfast in charge of a guard when the other prisoner killed the guard and both prisoners escaped. It did not appear that accused assisted in the murder or knew in advance that it was to be committed. The fact that accused escaped when the opportunity presented itself does not support an inference that he had joined in planning the escape (43-339).

30. A sentinel who shoots an escaping prisoner should be brought to trial by court-martial for the most serious offense, if any, of which, upon investigation, he may be deemed guilty. If the investigation shows no offense on the part of the sentry, he may not be tried (30-1617) (40-454 [84]), although it is sometimes advisable, especially in case of a homicide, to bring the sentry to trial by court-martial in order to forestall action by the civil authorities.

31. Escape from civil confinement is not chargeable under this Article, but it is a violation of (General) Article 96 (30-1466) (40-427 [4]).

31a. A prisoner of war legally cannot be convicted of an "escape from confinement." For him, escape is not unlawful, and under the Geneva Convention he is liable to no more than summary disciplinary punishment therefor (43-53). An accused who escapes from confinement in a penitentiary where he is serving a court-martial sentence, may not be confined in a penitentiary for the escape. The escape is purely a military offense (43-378).

## VI. RELEASE FROM ARREST OR CONFINEMENT

(See M.C.M. 21)

32. The accused is not entitled, as a matter of right, to be released from arrest after trial until the reviewing authority has passed upon the case (12-152), but if the sentence does not include confinement, and there are no other charges pending against him or other reasons for continuance of his restraint, he should be released therefrom, but he need not be placed on duty (30-1242) (40-427) [1] [2]). The nature of the restraint imposed upon an officer awaiting final action upon a sentence to dismissal is within the discretion of the officer exercising general court-martial jurisdiction over him (44-231). Whenever confinement or arrest of the accused is deemed necessary or advisable pending final action by the reviewing or confirming authority, it should be imposed by the local commander at the place where the accused is stationed or where the trial was held. If confinement or arrest so imposed is breached or an escape therefrom occurs, the offense is properly chargeable under this Article (44-289).

32a. If a trial is unreasonably delayed, an accused, if in arrest, should be released therefrom, but he cannot release himself. He must apply for release through proper channels (12-152, 153). A status of arrest imposed upon an accused prior to trial does not automatically terminate upon approval of the court-martial sentence. He continues in his pre-trial status until the court-martial order has been served upon him, or other action taken to implement and execute the court-martial order (45-386).

33. A soldier in arrest or confinement awaiting trial should not be released and required to do duty except in an emergency of the service (12-480, 481), unless he has been acquitted or the sentence imposed by the court contains no confinement (12-566); but he should not be ordered out of the jurisdiction of the reviewing authority until the case is finally disposed of.

34. If a prisoner is released by mistake before the expiration of his sentence he may be recommitted (12-567).

35. Bail is wholly unknown to military law, and a civil court cannot admit an accused to bail in a military case (12-481). But see Article 74, Annotation, par. 39.

\* \* \* \*

*ARTICLE 70. CHARGES; ACTION UPON, UNNECESSARY DELAY. When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. (As amended by S.S.A. '48, effective Feb. 1, 1949). (See M.C.M. 158).*

(Note: The former Article 70 covered the whole subject of the initiation of charges and action thereon preliminary to the trial. All except the single paragraph now remaining in this Article has been transferred, with some modifications and additions, to Articles 46 and 47).

#### ANNOTATION

1. Charges should be preferred and brought to trial as soon as practicable after the offense is committed. Accumulating or "saving up" charges is discountenanced (12-490). "Saving up" of charges is permissible when done for the purpose of giving the accused a chance to avoid court-martial by mending his ways. In such case he cannot complain if, when it becomes apparent that he will not amend his conduct, he is brought to trial for his accumulated offenses. It is only when the accused is in arrest or confinement that he is entitled to a speedy trial (43-376, 377).

\* \* \* \*

*ARTICLE 71. REFUSAL TO RECEIVE AND KEEP PRISONERS. No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct. (See M.C.M. 159).*

#### ANNOTATION

1. There is no authority for the employment of troops to guard civilian prisoners, but in emergencies guard house facilities may be used, at the request of the civil authorities, for the safekeeping of such prisoners (12-270). When a civilian is apprehended on a military post in the act of committing a crime, he may be confined in the

guardhouse until he can be turned over to the civil authorities (12-267). (See also Article 68, Annotation, par. 2). This has no reference to the internment of alien enemies in time of war.

2. The commander of a military post in the United States may permit the confinement in his post guard house of members of foreign allied forces stationed at the post, pending their trial by a court-martial convened by their own commander, although their offenses do not involve United States soldiers or civilians (43-130). See also (43-7) cited in paragraph 1a, Annotation, under Article 2.

3. Failure to comply fully with the provisions of this Article by the "officer committing" the accused does not affect the jurisdiction of the court to try the charges when it does not appear that any substantial right of the accused was prejudiced thereby (46-335, 336).

• • • •

*ARTICLE 72. REPORT OF PRISONERS RECEIVED. Every commander of a guard to whose charge a prisoner is committed shall, within 24 hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report he shall be punished as a court-martial may direct. (See M.C.M. 160).*

*ARTICLE 73. RELEASING PRISONER WITHOUT PROPER AUTHORITY. Any person subject to military law, who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct. (See M.C.M. 161).*

### ANNOTATION

1. The specification under a charge for violation of this Article should show whether the offense was committed by design or through neglect (12-484).

2. The fact that certain members of the guard are assigned to watch designated prisoners does not relieve other members of the guard of the duty of preventing the escape of such prisoners (12-583). But to constitute an offense under this Article it is necessary to show that the prisoner whom the accused allowed to escape was duly committed to his charge by competent authority, or as an incident to his duty (30-1554) (40-431).

• • • •

*ARTICLE 74. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES. When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or re-*

sult of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence. (See M.C.M. 162).

### ANNOTATION

|   | Pars.  |
|---|--------|
| I. IN GENERAL .....                         | 1-9    |
| II. WHEN SURRENDER MAY BE REFUSED           |        |
| IN TIME OF WAR .....                        | 10-13  |
| WHEN MILITARY JURISDICTION HAS AT-          |        |
| TACHED .....                                | 14-16  |
| MILITARY PRISONERS .....                    | 17-18  |
| CRIME COMMITTED ON FEDERAL RESER-           |        |
| VATION .....                                | 19-27  |
| III. OFFENSES COMMITTED ON ARMY TRANS-      |        |
| PORTS .....                                 | 28-29  |
| IV. ATTENDANCE AS WITNESSES IN CIVIL        |        |
| Courts .....                                | 30-30a |
| V. WHEN ACCUSED HAS ALREADY BEEN TRIED      |        |
| BY COURT-MARTIAL .....                      | 31     |
| VI. EXTRADITION OF SOLDIERS .....           | 32-33  |
| VII. HABEAS CORPUS .....                    | 34-39a |
| VIII. DESERTERS .....                       | 40     |
| IX. SERVICE OF PROCESS IN CIVIL SUITS ..... | 41-43  |

### I. IN GENERAL

1. The application for the surrender of a soldier to the civil authorities should be sufficiently specific to identify the accused and

the crime with which he is charged, otherwise the military authorities cannot properly surrender, nor can the civil authorities arrest, a military person within a military command. Generally a formal warrant should be required; and a soldier, although willing to surrender himself to the civil authorities should not be permitted to do so except "upon application duly made" to his commanding officer in compliance with this Article (12-134, 136; 30-1425) (40-432 [2]).

2. This Article applies where the crime was committed before the party entered the military service (12-135).

3. The expression "laws of the land", as here used, means the laws of a state or territory, or of the United States, including the common law as therein recognized; also city or town ordinances (12-135).

4. When warrants from Federal and state courts are issued in the same case, the offender should be surrendered to the official whose service is first made. No official of the army has authority to pass upon the sufficiency of any warrant issued by a civil court (12-271).

5. This Article does not affect the rule of comity which prevails when two independent criminal courts have jurisdiction over the same person or case, the rule being that the authority whose jurisdiction first attaches by service of process retains the jurisdiction (30-1425) (40-432 [2]). (See M.C.M. 11).

6. If the accused is acquitted or otherwise released by the civil authorities he cannot be reimbursed for his expenses in returning to his station. If he is released on bail, or escapes, and returns himself to military control, it is the duty of his commander to cause him to appear for trial at the proper time (12-137).

7. The military authorities are under no obligation to deliver the prisoner to the place where he is wanted, and this Article does not apply unless application is made by the civil authorities having proper jurisdiction (12-136, 137, 138) (40-432 [2]).

8. When a man who had been convicted of a felony and paroled by a civil court enlisted in the army, fraudulently concealing the fact that he was a felon, and after his parole had expired the court which had convicted him attempted to revoke it and demanded his surrender, it was held that the attempted revocation of the parole after its expiration being illegal, he should not be surrendered, and that his enlistment being voidable only at the option of the Government, he could be held in the service (30-1429) (40-432 [1]).

9. This Article applies only to "persons subject to military law" and persons not so subject, although residing at a military post, may be arrested by the civil authorities without permission of the commanding officer; but courtesy demands that such permission should be obtained although it cannot be required (12-157). A military

reservation should not be permitted to become a haven for criminals (30-1065) (40-p. 984). Of course, state civil authorities have no power to serve process upon a Federal military reservation unless the state has retained jurisdiction for that purpose (See section II, this note).

## II. WHEN SURRENDER MAY BE REFUSED

### *In Time of War*

10. This Article is not operative in time of war, but it is not prohibitive, and surrenders, may therefore be made in proper cases (12-134, 137).

10a. Jurisdiction to try and punish for the crime of murder committed by a person in the military service upon a civilian in a place within the jurisdiction of a State is not vested exclusively in a court-martial. The trial of a soldier by a State court in such circumstances, where no demand was made by the military authorities for the custody of the accused, has been upheld. No express consent is necessary. The concurrent jurisdiction of the State authorities continues in the absence of demand for his custody by the military authorities (42-163, 326).

11. In time of war the military authorities have the paramount right to the custody of a soldier charged with a civil offense (30-1428) (40-432 [3]). There is no offense which, in time of war, is not cognizable under the Articles of War (See Articles 92, Murder-Rape; 93, Various Crimes; 94, Frauds; and 96, General Article). The assertion of this right is within the discretion, in the first instance, of the local commanding officer, usually with the approval of the commander exercising general court-martial jurisdiction of the command in which the accused belongs. If surrender is made to the civil authorities they should be allowed to retain the jurisdiction (30-1425) (40-432 [3]), and the military authorities should not, in any way, interfere in the case (30-1430) (40-432 [2]).

11a. When a homicide is committed by a soldier "in the performance of duty", if it is believed that he would not receive an impartial trial by the civil courts, the military authorities should retain the jurisdiction (40-432) [2]).

12. During the First World War it was the policy of the War Department to refuse to surrender soldiers to the civil authorities except for serious crimes, such as common-law felonies, or where, because of alienage, or the nature of their offenses, they were deemed undesirable persons to be retained in the military service (30-1426, 1429, 1431) (40-432 [3]). In time of war the civil authorities do not have the legal right to arrest and detain soldiers for misdemeanors (40-432 [5]).

12a. The provisions of Cir. 2, W. D. 1942, announcing the policy under this Article to decline in time of war to turn over to the civil authorities soldiers charged with civil offences, other than very serious ones, relates to crimes committed both before and after induction into the service (42-19).

12b. An officer who, in good faith and for substantial reasons, was contesting the jurisdiction of a civil court, was ordered by said court to be arrested and confined for contempt in refusing to comply with the court's order to surrender custody of his child, and the civil authorities requested delivery of the officer. Held, the request should be denied. In time of war it is the policy of the War Department not to surrender an officer or enlisted man under such circumstances (42-274).

13. In time of war the army, acting by authority of the President, is authorized to cooperate with an allied force. The intervention of an international boundary line is no obstacle to such cooperation, and where a deserter from the Canadian army in World War I was apprehended by the civil authorities in the United States in the act of assisting a U. S. soldier to desert, it was held that, upon being delivered to the military by the civil authorities the Canadian deserter should be returned to the Canadian authorities at the international boundary (30-1427) (40-p. 12).

#### *When Military Jurisdiction Has Attached*

14. For the military jurisdiction to attach, the accused should be in military control, under charges, with a view to his trial by court-martial. Under these conditions the military authorities may decline to surrender jurisdiction. The jurisdiction may, however, be waived (12-134, 135, 136, 495, 512, 514). The proper authority to waive it is the commander having jurisdiction over the court-martial by which accused would have been tried, or higher authority (12-138); and when so waived, the civil authorities should be permitted to retain custody of the soldier to enforce the sentence of the civil court (30-1425) (40-432 [5]).

15. The right of the military authorities to punish a soldier for a military offense is paramount to any right of control over him by a parent or guardian on account of his minority (12-401).

16. When a soldier is under a military charge of manslaughter committed in the civil jurisdiction and the civil authorities request his surrender for the same offense, the request should ordinarily be granted unless there are circumstances warranting an opinion that the accused might not be awarded a fair and impartial trial in the civil court (30-1430) (40-432 [2]).



*Military Prisoners*

17. There is no obligation to surrender a military prisoner to the civil authorities; the question depends mainly upon the nature of the crime charged, and unless it is particularly serious, surrender should generally be refused until the military punishment has been executed (12-69). See also Sec. VIII, this Annotation.

18. An escaped military prisoner who commits an offense for which the civil authorities request his surrender after his apprehension by the military, may be held by the military authorities to serve his original sentence. A military prisoner need not be released to serve out a sentence imposed by a civil court before his enlistment in the army, even though he was wanted for violation of his parole at the time of his enlistment (30-1425) (40-432 [1] [2]).

*Crime Committed on Federal Reservation*

19. When a crime is committed by a person subject to military law upon a military reservation over which jurisdiction has been ceded to the United States, jurisdiction is vested in the Federal criminal courts or a legally constituted court-martial, and the military authorities should refuse to surrender the accused to any state official (12-137, 138).

20. When the jurisdiction of the United States upon a military reservation is *unconditionally exclusive*, no state official can legally serve any process within the limits thereof. Such exclusive jurisdiction may have been acquired either by a reservation by the United States at the time the state was admitted to the Union, or by an act of consent or cession by the state legislature. In the latter case the state may, and often does, reserve to itself the right to serve legal processes growing out of acts committed off the reservation (*i.e.* in state territory) within its limits. But when there was no reservation of jurisdiction by, nor cession of jurisdiction to, the Federal government, the state officials have the same authority over acts committed on the military post as elsewhere in the state. Civil and criminal process of United States courts may, of course, always be served on military reservations (12-940).

21. The mere consent of a state legislature to the purchase, by the United States for military purposes, of land within the limits of the state, vests exclusive jurisdiction in the United States over the land so acquired (12-933, 934). This is by reason of a provision in Article I, section 8, of the Federal constitution by which exclusive jurisdiction is vested in the United States "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings" (30-1065); and where the Federal jurisdiction is

acquired under this constitutional provision the state cannot reserve concurrent jurisdiction (30-1430) (40-pp. 6-10). An acquisition of land by "condemnation" is a purchase within the meaning of that term as used in the Constitution and in an act of the Legislature of the state in which the land was located "consenting to the purchase by the United States of lands within the state" for military purposes (43-335).

22. When consent to purchase has been given or exclusive jurisdiction ceded by a state, the land is no longer a part of the state in a political or legal sense (12-937), and exclusive jurisdiction over it is concurrent in the Federal civil courts and courts-martial (30-1430). In such case the exclusive jurisdiction of the United States cannot be acquired or lost by waiver (30-1066). But the mere leasing by the United States of a cantonment site does not vest exclusive jurisdiction in the Federal government (30-1064, 1065). However, when a state legislature ceded jurisdiction in and over lands acquired by the United States by "purchase, condemnation, lease or otherwise", saving only the right to serve state process therein, it was held that exclusive jurisdiction was vested in a camp leased by the United States (30-1065) (40-pp. 6-10) (43-335). But when the state law provides that exclusive jurisdiction shall not vest in the United States until it "has acquired title" a lease does not vest exclusive jurisdiction in the United States (42-148).

23. When a military reservation is located in a territory of the United States, the territorial courts, being courts of the United States, have concurrent jurisdiction with other Federal courts including courts-martial (12-942).

24. The reservation by a state of the right to serve legal process upon a Federal reservation within its borders relates only to acts committed, or causes of action arising, outside of said reservation, and any violations of law committed on the reservation are cognizable only by the proper officers of the Federal government (30-1065, 1066) (40-pp. 6-7).

25. The military authorities should not, themselves, arrest civilians for violations of local laws, neither should they permit a military reservation to become an asylum for such violators. Under reasonable regulation the local civil authorities should be allowed to make arrests within the camp (where the state still has the jurisdiction), or the offenders may be conducted to the boundary of the camp and excluded therefrom (30-1065) (40-p. 984). In all such cases the military and state authorities should cooperate in every possible way, but neither should do any act which is beyond the limits of their power and jurisdiction (30-1066) (40-p. 7).

26. When the state has reserved the right to serve process on a military reservation, a civilian employee of the United States may

be arrested on the reservation by a state officer armed with a proper warrant regardless of whether such civilian employee is actively engaged in his duties (30-1066) (40-p. 7).

27. When the Federal government has exclusive jurisdiction over a military reservation it includes control over public roads and streets within its limits. Such jurisdiction includes the power to establish and enforce all reasonable traffic regulations and persons violating such regulations may be summarily arrested by the military authorities and turned over to the Federal civil authorities for prosecution (40-p. 5).

### III. OFFENSES COMMITTED ON ARMY TRANSPORTS

28. When an offense is committed on an army transport by a person subject to military law a military prosecution should be at once initiated unless the injured party is a civilian and the transport is, at the time, in the territorial waters of a state or territory, in which case the offender should be surrendered to the civil authorities (12-271).

29. In case of a felony or serious misdemeanor committed on an army transport on the high seas by a person not subject to military law, the offender should be confined and turned over to the proper civil authorities at the first available port (12-271). See also Article 2, Annotation pars. 17 and 23.

### IV. ATTENDANCE AS WITNESSES IN CIVIL COURTS

30. Persons subject to military law cannot be ordered by the military authorities to attend a civil court as witnesses, but the military should cooperate with the civil authorities in such cases (12-221).

30a. Requests for military persons to come before notaries public to give depositions in civil suits should be addressed to the commanding officer of the individuals concerned, and it is in the discretion of such commanding officer to grant members of his command leave for such purpose (42-87). However, the War Department will not take affirmative action in such matters (42-142).

### V. WHEN ACCUSED HAS ALREADY BEEN TRIED BY COURT-MARTIAL

31. If the civil authorities demand the surrender of a soldier to be tried for an offense for which he has already been tried by court-martial, he should be surrendered. The question of the jurisdiction of the civil court in such cases is a judicial one to be raised before the proper civil tribunal. It cannot be decided by the military au-

thorities (12-171). In time of war surrender may be refused (See section II above).

## VI. EXTRADITION OF SOLDIERS

32. Soldiers may be subject to extradition process the same as civilians, and a soldier serving with an army of occupation in foreign territory may be surrendered to a state official, supplied with proper papers, sent to receive him. The question of international jurisdiction is not involved in such case (12-627). In respect to extradition a soldier is in the same status as a civilian, and there is no authority for the transportation of a soldier at the expense of the United States to the place where he is wanted by the civil authorities (30-1305) (40-432 [3]).

33. When a soldier stationed in Texas was wanted by the civil authorities of Alabama it was held that, so far as his surrender by the military authorities was concerned, extradition process was not necessary, and that he should be turned over to the Alabama authorities upon presentation of a proper warrant and such identification of accused as would satisfy the commanding officer (30-1305) (40-432 [2]).

## VII. HABEAS CORPUS

(See M.C.M. Chap. XXX)

34. In a case of disputed jurisdiction over a person subject to military law, as between the civil and military courts, the question should be raised by writ of *habeas corpus* in a Federal court (12-171). The military authorities must recognize such writ and surrender the body of the person wanted in response thereto, leaving the whole question to be decided by the court from which the writ issued. But no state court, or judge, is authorized to discharge on *habeas corpus* any person, military or civil, who is in the military custody of the United States, and no state court has jurisdiction to pass upon the legality of a soldier's enlistment, or to discharge him therefrom, or to pass upon the legality of the detention of any person by the Federal military authorities (12-268, 269, 270, 409).

35. No officer of the United States military forces is required to comply with a writ of *habeas corpus* issued by state authority. In such case return should be made showing that the person is held by authority of the United States. Should the state, in such case, attempt to enforce its process, the military authorities would be justified in using such military force as might be necessary in resisting it (12-270). The same rule applies in the case of a civil officer who has in his custody a deserter arrested by him but not yet delivered to military control (12-401).

36. Court-martial proceedings are not reviewable by the civil courts. It is not the purpose of a writ of *habeas corpus* to perform the functions of a writ of error (12-577). In a recent case it was held by the U. S. Circuit Court of appeals that under a petition for a writ of *habeas corpus*, brought by one who had been convicted of a crime by a court-martial, the question for decision is whether the petitioner has been deprived of his liberty "by due process of law", and that for members of the military forces "due process of law means the application of the procedure of the military law", but that a mere procedural error (e. g. presence of the trial judge advocate at a closed session of the court-martial) is not a proper matter of inquiry in *habeas corpus* proceedings (44-110-113). See Art. 30, Anno., par. 2.

36a. In *habeas corpus* proceedings the function of the civil court is purely to determine whether the court-martial had jurisdiction and if so, whether it exceeded its power (45-443). In determining whether an offense within the jurisdiction of the military court was charged, it is sufficient if the language is, according to the natural import of the words, fully descriptive of the offense, and the charges need not be stated with the precision of a common-law indictment (48-150, citing various decisions of the Federal Courts).

37. If state authorities refuse to surrender a soldier of whose custody the Federal military authorities have the paramount right, the proper procedure is to refer the matter to the Adjutant General with recommendation that the Department of Justice be requested to obtain custody through *habeas corpus* proceedings (30-1425) (40-432 [5]).

38. When, by writ of *habeas corpus* issued by a Federal court, a military prisoner is required to be produced in court, regular military travel orders may be issued entitling the officer in charge, the prisoner, and a suitable guard, to the authorized travel allowances (30-1853) (40-1533).

39. If, on *habeas corpus* brought by a military prisoner, the writ is dismissed and an appeal granted to the U. S. Supreme Court, the judge to whom the writ was returnable may, under the rules of the Supreme Court, admit the prisoner to bail after he has been remanded to military custody (30-1425) (40-757).

39a. It has been held by the Texas Court of Appeals that *habeas corpus* could not be maintained by a soldier who had been surrendered by the military authorities for trial by the State court for a negligent homicide, the soldier claiming that exclusive jurisdiction to try him lay in the military courts. After a clear and concise analysis of the statute (A.W. 74) the court summed up the case as follows: "Two authorities have concurrent jurisdiction of the offense charged: one, the civil authorities are seeking to enforce their juris-

diction; the other, the military authorities not only do not seek to enforce their jurisdiction, but acquiesce in the jurisdiction of the civil authorities. It does not lie with the accused to select the tribunal by which he is to be tried." The court intimated, however, that had the petition for the writ been brought by the military authorities, thus asserting their jurisdiction, it would have been granted, "especially in time of war" (42-19, 20).

### VIII. DESERTERS

40. When a deserter commits a serious crime while absent in desertion, for which he is apprehended, tried by the civil authorities, convicted, and sentenced to confinement by a civil court, the civil authorities will, generally, even in time of war, be permitted to retain the jurisdiction for the purpose of enforcing the sentence. In such case the civil authorities should be requested to return the deserter to military control at the termination of his sentence (30-1427) (40-432 [5]).

### IX. SERVICE OF PROCESS IN CIVIL SUITS

41. A soldier cannot be arrested on mesne process or charged in execution for any debt unless it was contracted before his enlistment and amounted when first contracted to twenty dollars (M.L. U. S. 139). When a soldier was about to leave a state under military orders, and the civil authorities sought to arrest him as an absconding debtor, for a debt contracted after his enlistment, it was held that such arrest was illegal and that he should not be surrendered; but a soldier at home on furlough is not exempt from personal service of civil process (30-109) (40-139).

41a. A soldier, previous to induction, was convicted by a State court of nonsupport of his wife and ordered to pay a certain amount per month for her support, and after induction, while in the State on furlough, was arrested for violation of such order. It was held that he was imprisoned under criminal rather than civil process, and R. S. 1237 (M.L.U.S. 139) did not apply (42-6).

42. Property of a civilian contractor on a military reservation, upon which reservation the state has reserved the right to serve civil process, may be taken upon an execution in favor of private parties, and should be surrendered upon due process issued from a state court, unless the government has some claim thereon (30-1066) (40-p. 7).

43. It is not the policy of the War Department to take affirmative action to effectuate service of civil process on military personnel. Permission to enter military reservations for the purpose will ordinarily be granted by post commanders, but, since military personnel are frequently inaccessible for such purpose, application should be made in advance for information as to the time and place where service may be made (42-313).

## CHAPTER XIV

### PUNITIVE ARTICLES—WAR OFFENSES

*ARTICLE 75. MISBEHAVIOR BEFORE THE ENEMY. Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters shall suffer death or such other punishment as a court-martial may direct. (See M.C.M. 163).*

#### ANNOTATION

1. This offense may be exhibited as cowardice, willful violation of orders, gross negligence, inefficiency, or an act of treason or treachery. It need not be in actual sight of the enemy (12-128). Or it may consist of a culpable failure to do his whole duty while before the enemy (44-471). An officer, while his company was in the immediate presence of the enemy, declared that he "could not advance" on an attack in which his platoon was to participate. Such declaration was held tantamount to a "refusal" to advance with his company, and his conviction of a violation of this Article was sustained (44-146). An officer refused to advance with his command when so ordered by his regimental commander. The order was given by telephone. Accused had been in direct contact with the enemy in active combat for several days and had lost much sleep. Six witnesses, who observed accused's condition at the time, testified that he was mentally and physically exhausted. The regimental commander, basing his opinion solely on the telephone conversation, testified that accused was able to advance and that his refusal to obey the order was due to fright. Held: The conclusions of the regimental commander, who had not observed the accused, were incompetent and clearly prejudicial to accused's substantial rights. Since the capacity of the accused to obey

the order had been placed in issue, the burden was upon the prosecution to prove such ability beyond a reasonable doubt. The conviction was disapproved (44-469).

2. The words "before the enemy" imply contact with the enemy. It is not a question of distance, but rather of tactical relation. Actual contact with the enemy is not necessary. It is sufficient if the organization with which accused was serving at the time was so situated, either in the front lines or in reserve, as to indicate its involvement in an impending combat. It has been held that a soldier who was with the rear echelon of his battery ten miles to the rear was "before the enemy" within the meaning of this Article (30-1545) (40-433 [2]). The rear echelon of a company, the forward echelon of which is engaged with the enemy, is "before the enemy" (44-379). When a soldier failed to debark from a transport with his unit on a beach where enemy resistance was expected, and, upon his debarkation the next day, remained absent from his organization until he surrendered at a "stragglers' collection point" 13 days later, a conviction of misbehavior before the enemy was sustained (44-98). A crew member of a bomber, in the course of a flight on an operational mission against the enemy, was tried for misbehavior before the enemy under a specification alleging that by his misconduct he endangered the safety of his ship and crew which it was his duty to defend in that he failed to comply with certain orders given him by the pilot in command. Although the particular plane and crew were not under direct attack at the time, other ships of the expedition were engaged with the enemy. Held: Accused was "before the enemy" within the meaning of this Article, and his conviction was sustained. The plane and its crew constituted a "command" within the clause of the Article denouncing disobedience which "endangers the safety of any fort, post, guard or other command which it is his duty to defend" (44-343). An airforce heavy bombardment squadron located within 200 miles from a fighting front is, for all practical purposes, on the front. When a combat crew member who has been ordered to participate in a combat mission wrongfully acts or neglects to act in a matter vital to the immediate, normal course of a combat operation, he has misbehaved before the enemy in violation of this Article (45-11, 12).

3. An accused may be convicted of both desertion and misbehavior before the enemy when the same absence is the basis of both charges. They are separate offenses (30-1545) (40-428 [5]); but absence without leave is a lesser included offense in both (30-1438) (40-433 [3]).

4. A soldier who is ordered from an organization not "before the enemy" to one which is so engaged, who fails to join the organization to which he was ordered, cannot be convicted of a violation of this Article (30-1546) (40-433 [1]) (45-137). A soldier in confinement in a stockade, when told that he would be returned under guard to



his company, then engaged with the enemy, escaped from confinement. His conviction of misbehavior before the enemy "by failing to rejoin his company, then engaged with the enemy, when under a duty to do so" was disapproved (45-178). He should have been charged with desertion.

5. An allegation that the accused "abandoned his company when it was about to be engaged with the enemy" is sufficient to charge a violation of this Article; but a specification which fails to allege that the act was "before the enemy", or facts which fail to show such to have been the case, is fatally defective and cannot be cured by proof (30-1546) (40-433 [1]). An allegation that accused was "drunk on duty in the presence of the enemy" is sufficient (48-150).

6. A material variance between allegation and proof as to time and place will be fatal. The defense against this charge is sufficiently difficult when it is alleged with approximate precision (30-1547) (40-433 [4]). Proof that accused abandoned his company without authority, while it was before the enemy, will sustain a conviction under this Article regardless of the length of time he was absent from his duty (44-146).

7. The term "his arms and ammunition" is to be construed in connection with the further expression "his post or colors", and does not mean his personal property, but that which has been furnished him for his use in the service (12-128).

8. The offense of "running away from the enemy" is a military offense not punishable by confinement in a penitentiary or reformatory (43-425).

\* \* \* \*

*ARTICLE 76. SUBORDINATES COMPELLING COMMANDER TO SURRENDER. Any person subject to military law who compels or attempts to compel any commander of any garrison, fort, post, camp, guard, or other command to give it up to the enemy or to abandon it shall be punishable with death or such other punishment as a court-martial may direct. (See M.C.M. 164).*

*ARTICLE 77. IMPROPER USE OF COUNTERSIGN. Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death, or such other punishment as a court-martial may direct. (See M.C.M. 165).*

*ARTICLE 78. FORCING A SAFEGUARD. Any person subject to military law who, in time of war, forces a safeguard shall suffer death or*

*such other punishment as a court-martial may direct.* (See M.C.M. 166).

## ANNOTATION

1. The term "safeguard" means an order of protection issued by a military commander for the benefit of persons or property which, for reasons of military discipline, proper personal considerations, matters of public policy, humanity, or the like, it is desired to protect from molestation by the troops. The offense of "forcing a safeguard" consists in a willful disregard and violation of such order of protection to the injury of the persons or property for whose benefit the safeguard was established (Winthrop's Mil. Law, Ed. 1920, pp. 663-666).

\* \* \* \*

**ARTICLE 79. CAPTURED PROPERTY TO BE SECURED FOR PUBLIC SERVICE.** *All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.* (See M.C.M. 167).

## ANNOTATION

1. This Article is in accordance with the principle of the laws of war, as recognized by our government, that soldiers cannot capture for their own private benefit. Military stores taken from the enemy are the property of the United States, and an officer or soldier who appropriates such articles renders himself chargeable for a violation of this Article (12-1060, 1061) (46-280).

1a. An American soldier was wounded in action and took refuge in a shell hole where he found a wounded German officer who gave him a large sum of French currency, saying "Here's something for you, there's plenty more where I got that." It was held that such money belonged to the Government and a claim to it made by the American soldier was denied (45-389).

2. The private property of prisoners does not become government property, neither may it be declared forfeit on account of their attempted escape (30-2218) (40-p. 15).

3. Captured records of an enemy regiment are the property of the United States and may not be restored to the enemy government except by authority of Congress (30-2067) (40-437).

3a. The transfer of war material captured by a Division to a "Division Memorial Commission" for permanent display in a museum to be built after the war, can be authorized only by direction of Congress (44-381).

4. Captured supplies may be used for the maintenance of prisoners of war, but may not be turned over to the prisoners unless shown to be their private property (30-2216) (40-p. 15).

5. Public property of an allied or associated power recaptured is not in the status of "captured enemy property" and its disposition is not covered by this Article (30-2067) (40-437).

6. During World War I it was held that the property of a deceased interned enemy alien should be turned over to the Alien Property Custodian; and where money belonging to interned enemy aliens was deposited by an officer of the U. S. Army as custodian in an interest bearing bank account, it was held that the principal sum should be returned to the owners, but that the accrued interest was the property of the United States and should be deposited in the U. S. Treasury. It was also held that personal effects abandoned by interned alien enemies whose owners could not be located, might be sold or destroyed, except unopened mail, which should be turned over to the Post Office Department (30-2218) (40-2180a [2]).

\* \* \* \*

#### ARTICLE 80. DEALING IN CAPTURED OR ABANDONED PROPERTY.

*Any person subject to military law who buys, sell, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties. (See M.C.M. 168).*

#### ANNOTATION

|                              | Pars. |
|------------------------------|-------|
| I. CAPTURED PROPERTY .....   | 1     |
| II. ABANDONED PROPERTY ..... | 2-6   |

#### I. CAPTURED PROPERTY

1. As noted under the preceding Article, guns and other captured property belong to the government. Captured property cannot be disposed of except by authority of Congress (30-2067. See M. L. U. S. 2180).

#### II. ABANDONED PROPERTY

2. This Article applies only to abandoned property left in military control. Thus personal property left by deserters at a military post

is "abandoned property" within the meaning of this Article, but, in the absence of special circumstances, property left by a deserter in rented quarters, not under military control, is not within the purview of this Article (30-341) (40-p. 995). "Abandoned property" may be sold and the proceeds deposited in the U. S. Treasury, but both the intent to abandon and actual relinquishment must be shown before personal property may be considered as abandoned (30-340) (40-p. 880). Public or private captured or abandoned property belongs to the Government, and not to the individuals who take or find it. Wrongful disposition of such property by a soldier for his own profit or advantage, is a violation of this Article (45-338) (46-205). The gravamen of this offense is the receipt by accused of "profit, benefit or advantage to himself" and without a finding of this essential element a conviction cannot stand (47-293).

3. The property of an officer who goes absent without leave, leaving his effects in the custody of his wife in government quarters, cannot be regarded as abandoned, and the fact that he is indebted to civilians or the government does not justify its seizure by the military authorities. Such is the function of the proper authorities acting under due process of law (30-341) (40-p. 880).

4. Personal effects left at a military hospital, the owners of which cannot be found, may be treated as abandoned property (30-342) (40-p. 915), and the same is true of property left by military personnel in storage under military control (30-343) (40-p. 880).

5. Personal effects of an insane soldier left at his station when he was removed to the U. S. Government hospital for the insane where he remained after his discharge as a soldier, he being unable to give instructions as to their disposition, are not abandoned property, but, in the absence of a guardian or other legal representative, may be disposed of by the military authorities as may seem best in the interests of the owner (30-344).

6. A prosecution for attempt to dispose of stolen property cannot be laid under this Article (30-1498) (40-438).

\* \* \*

*ARTICLE 81. RELIEVING, CORRESPONDING WITH, OR AIDING THE ENEMY. Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct. (See M.C.M. 169).*

## ANNOTATION

|   | Pars. |
|---|-------|
| I. IN GENERAL .....                     | 1-4   |
| II. RELIEVING THE ENEMY .....           | 5     |
| III. CORRESPONDING WITH THE ENEMY ..... | 6     |
| IV. GIVING INTELLIGENCE .....           | 7-8   |
| V. PRISONERS OF WAR .....               | 9     |

## I. IN GENERAL

1. Civilians as well as military persons are amenable to trial by court-martial under this Article. However, it is only when such offenses are committed by civilians in the theatre of war, or in a district under martial law, that military courts should take jurisdiction. If proceedings under this Article are brought against civilians it is by virtue of the jurisdiction of martial law which owes its existence to necessity rather than legislation (12-128, 129).

1a. Violation of the laws of war by enemy belligerents charged under this Article are triable by military commission regardless of the citizenship of the offenders and the fact that the civil courts are open (42-260).

2. All inhabitants of hostile countries are *prima facie* enemies in the sense of this Article (12-129).

3. This Article is equally applicable during a suspension of hostilities under an armistice as during actual hostilities (30-2210).

4. Aiding the enemy by speeches and propaganda is not an offense under this Article (30-1551) (40-440).

## II. RELIEVING THE ENEMY

5. The act of "relieving the enemy" here contemplated is distinguished from trading with the enemy in violation of the laws of war, but it is no less a "relieving" of an enemy under this Article where a commodity desired by the enemy is furnished and paid for in money or other medium of exchange (12-129). The surreptitious furnishing of a compass to prisoners of war to facilitate their escape is a violation of this Article regardless of the precise status of the prisoners or the jurisdiction under which they are held (44-471).

## III. CORRESPONDING WITH THE ENEMY

6. This offense is completed by writing and putting in progress a letter to an inhabitant of any enemy country. It is not essential that the letter should reach its destination (12-129).

## IV. GIVING INTELLIGENCE

7. It is essential to this offense that material information should actually be communicated to the enemy. The communication may be verbal, in writing, or by signals (12-129).

8. In time of war the President has power to control all means of communication with foreign countries so far as, in his judgment, it is necessary to safeguard our military plans and operations, and the Secretary of War, acting for the President, may take such action (30-2221, 2222) (40-pp. 11, 12).

## V. PRISONERS OF WAR

9. Prisoners of war should not be permitted to devote their wages or products of their labor in aid of institutions connected with or serving the enemy in any capacity (30-2213) (40-p. 15). See Art. 96, Anno., par. 5.

\* \* \* \*

*ARTICLE 82. SPIES. Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.* (See M.C.M. 170).

## ANNOTATION

1. This Article is one of the few provisions of law authorizing the trial of civilians by military tribunals. The gravamen of the offense is the treachery or deception practiced, such as being in disguise or acting under false pretenses. A member of the enemy forces found lurking inside our lines disguised in the uniform, or overcoat, of a United States soldier is *prima facie* a spy. So an enemy soldier who enters our lines dressed as a civilian may be presumed to be a spy unless he rebuts the presumption by showing that he came for some personal reason, such as to visit his family, and not to obtain information, in which case his offense would be a simple violation of the law of war (12-1057, 1058).

2. Under both international and military law spies are within the jurisdiction of military tribunals in time of war. Article 12 provides that general courts-martial have power to try any "person who by the law of war is subject to trial by military tribunals" (30-1337) (40-369 [8]).

3. A spy must be taken *in flagrante delicto*. If he succeeds in making his return to his own country the crime does not follow him, and if subsequently captured in battle, or otherwise than as a spy, he cannot properly be brought to trial as a spy (12-1057).

4. Offenses under this article are not restricted as to locality. The words "or elsewhere" cover the entire area of the United States (30-1337 (40-369 [8])) and all places where our forces are stationed.

5. A person taking photographs of fortifications in time of war runs the risk of being treated as a spy. His arrest outside the limits of a military reservation and the seizure of his photographic films would be lawful, although no notice to the public had been given prohibiting the taking of such photographs (12-1063).

6. During our Civil War an enemy soldier, arrested in New York disguised as a civilian, and who was shown to have been in contact with enemy agents in Canada for hostile purposes, was held amenable to trial as a spy; but an enemy soldier found in disguise in Maryland endeavoring to make his way back to his regiment from which he had become separated, was held not chargeable as a spy, but punishable for a violation of the laws of war because of his disguise (12-1057).

7. In the absence of any proof of an intent to communicate information to the enemy, although the circumstances may be such as to warrant further investigation by the civil authorities, the military jurisdiction under this Article should not be asserted (30-1552) (40-440).

8. An enemy belligerent charged with a violation of this Article may be tried by military commission regardless of his citizenship and the fact that the civil courts are open (42-260).

9. A unanimous vote of the court is required for a conviction under this Article (45-128-132).

10. "Aiding and abetting the enemy" in violation of Article 96 is not a lesser offense included in "spying" in violation of Article 82 (47-124).

## CHAPTER XV

### MISCELLANEOUS CRIMES AND OFFENSES

*ARTICLE 83. WILLFUL OR NEGLIGENT LOSS, DAMAGE, OR WRONGFUL DISPOSITION OF MILITARY PROPERTY. Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct. (See M.C.M. 171).*

#### ANNOTATION

1. The assessment of the "loss or damage" is an administrative proceeding governed by the regulations pertaining to surveys, and is entirely distinct from the punishment authorized by this Article, which is the function of a court-martial. A survey report is not competent evidence before a court-martial to prove the fact of the loss or damage (12-120), and the fact that a court-martial does not convict an accused of an offense under this Article does not preclude an administrative finding against him of pecuniary responsibility (30-615) (40-p. 898); and if, upon conviction by court-martial, the sentence does not require the accused to make good the damage, the right of the government, by administrative action, to require such restitution is not affected (30-608) (40-p. 898) (44-471, 472).

2. This Article is specific authority for the stoppage of pay of persons subject to military law to reimburse the government for loss of or damage to government property caused by their wrongful acts or negligence (30-608, 609, 612) (40-441 [2]). But when the amount involved is entirely disproportionate to a soldier's pay (i.e. \$20,000 for negligent burning of barracks by soldier smoking in bed) the commanding officer may, in an appropriate case, recommend that the Secretary of War cancel or remit the debt under the Act of May 22, 1928 (M.L.U.S. 1521) (43-357). This Article applies to a civilian employee who is a person subject to military law (44-404). It is not limited to cases of neglect by omission, but covers cases of malfeasance and misfeasance (44-382, 383). The test of pecuniary liability



is as prescribed in this Article, viz., that the damage was caused through "fault or neglect" (par. 2, AR 35-6640, 13 June 1942) and the fault or neglect must be the proximate cause of the injury. The mere fact that a damaged vehicle was being used without authority is not enough, unless it is shown that it was being used for the sole benefit of the user (44-471, 472).

2a. Spectacles or dentures issued to soldiers are not public property for the loss or destruction of which they are pecuniarily liable to the Government, but such loss or destruction, if wilful, and with intent to unfit themselves for full military duty, is punishable under Article 96 (44-126).

3. Upon remission of a sentence to confinement imposed upon a soldier for selling government property and converting the proceeds to his own use, his pay, after restoration to duty, may be stopped to satisfy any balance due the government on account of such conversion (30-611) (40-1521 [1]).

4. A mere shortage of property for which an officer is responsible, without any showing that the loss is due to his fault or negligence, does not come within the purview of this Article (30-608, Sup. 608) (40-1517); and the removal of government property from one place to another without authority, there being no evidence of an intent to wrongfully dispose of the property, is not sufficient to support a charge under this Article (30-1553) (40-441 [1]). It is essential that the "manner of the wrongful disposition" be alleged and proved (47-293) (48-136).

5. Unused coupon books belonging to the "U. S. Motion Picture Service" are not "military property belonging to the United States" within the meaning of this Article (30-Sup. 620) (40-1516 [6]).

6. Suffering property to be wrongfully disposed of in violation of this Article is not a lesser offense included in a charge of embezzlement or larceny under Article 94 (30-1553) (40-452 [4] [16]).

7. This Article applies only in cases when the accused is under some personal responsibility for the government property damaged, and when an officer's private automobile collided with and damaged a government truck, the truck not being under his individual control, custody or possession, he could not properly be charged under this Article (30-Sup. 608) (40-441 [2]) (44-382, 383).

7a. A conviction for negligent loss of property under this Article cannot be sustained when the property is shown to have been returned in the same condition as when removed (40-Sup. 441). The destruction of a government airplane caused by the negligence of the pilot in flying it at too low an altitude in violation of orders, renders the pilot liable to trial under this Article for negligently suffering the destruction of government property (43-271). Accused was convicted of operating a fighter plane in a careless and negligent manner and

colliding in mid-air with a bomber, under Article 96, and of suffering the fighter and the bomber to be damaged through neglect, under Article 83. The conviction was sustained except as to the damage to the bomber, which was disapproved because the bomber was not under accused's control (44-382, 383). See par. 7, this Annotation.

7b. This Article applies only when the loss or damage results from wilfulness or negligence. When a government truck was damaged by being driven off the road to avoid hitting cattle, the driver was held not liable under this Article although he was using the truck without authority at the time of the accident (44-188). Similarly when the driver lost control in passing another vehicle (44-471, 472). Where an accused was apprehended in an intoxicated condition, driving a damaged Government jeep which showed signs of having been in an accident, it was held, in the absence of evidence as to how or when the vehicle was damaged except accused's statement that he had "swerved off the road and hit something," that negligence on the part of the accused in the operation of the jeep could not be presumed (47-124).

8. Averment and proof of Government ownership of the property concerned is essential in a prosecution under this Article (30-Sup. 1461) (40-454 [100]). But a claim in favor of the United States may be asserted by survey proceedings for damage or loss of property in which the Government has only a special interest, as by way of requisition or lease (48-76).

9. As a general rule express statutory authority is required for the disposition of military property. However, the authority of the Secretary of War to issue supplies to destitute persons and render aid in disaster relief is recognized as based upon the "demands of humanity." There is also an exception under which the commanding general in a theater of operations may dispose of military property to an ally, or otherwise, as military necessity requires (43-421).

\* \* \* \*

**ARTICLE 84. WASTE OR UNLAWFUL DISPOSITION OF MILITARY PROPERTY ISSUED TO SOLDIERS.** *Any soldier who sells or wrongfully disposes of or willfully or through neglect, injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct.* (See M.C.M. 172).

#### ANNOTATION

1. Under this Article it is necessary to allege and prove government ownership of the property concerned and that it was "issued for use in the military service" (30-1596, 1597, Sup. 1461) (40-442 [1])

(48-34, 35). The term "military service" does not include "naval" service. The wrongful sale of Government property not pertaining to the military service is a violation of Article 96, and is a lesser included offense in a charge under Article 84 (45-137).

2. This Article specifies two distinct classes of offenses: (1) willful, and (2) negligent. The first implies wrongful or criminal intent, the second, mere negligence. Neither is included in the other (30-1597) (40-442 [2]). Thus under a charge for "wrongfully disposing" accused may not be convicted of "through neglect losing"; and "through neglect losing" is not included in a charge of "feloniously stealing" under Article 94 (Frauds) (30-1593) (40-452 [16]).

3. Under a charge of "unlawful selling" the court may not convict accused of "unlawfully disposing of the property in some manner not specified" (30-1597) (40-442 [3]).

3a. The offense of "abandonment of property" is not included in that of "unlawful sale" (42-275).

4. Under a charge of "through neglect losing", neglect must be proved—mere loss is not sufficient (30-1595) (40-p. 898).

5. A specification which alleges "wrongful disposition by removing from a government reservation", without alleging the manner of disposal, is bad, and if objected to, cannot be cured by proof (30-1596) (40-452 [20]).

6. Under a specification for "wrongful selling", proof of "pledging" the property for a loan is not sufficient (30-1597) (40-452 [21]).

6a. The offense of unlawfully pawning is not a lesser offense included within a charge of unlawful selling (42-20).

7. "Wrongful selling" cannot be established by proof merely that the property is missing, and in such case, there being no proof of the *corpus delicti*, a confession by accused that he sold the property is not admissible (30-1594) (40-395 [11]).

8. A variance between specification and proof as to the first name of the person to whom the property was sold is not material when there is no indication that accused was misled as to the person meant (30-1597).

9. This Article does not apply to officers. A violation of it by an officer is chargeable under Article 96 (45-279), and a wrongful sale or disposition by an officer or soldier could also be laid under Article 94.

10. The offense of unlawfully selling Government military property in violation of this Article is essentially a military offense and is not punishable by penitentiary confinement (47-122).

*ARTICLE 85. DRUNK ON DUTY. Any person subject to military law, who is found drunk on duty, shall be punished as a court-martial may direct. (As amended by S.S.A. '48, effective Feb. 1, 1949). (See M.C.M. 173).*

### ANNOTATION

|                                    | Pars. |
|------------------------------------|-------|
| I. "DRUNKENNESS" DEFINED .....     | 1-2   |
| II. "ON DUTY" DEFINED .....        | 3-7   |
| III. DRUNKENNESS NOT ON DUTY ..... | 8     |
| IV. SPECIFICATIONS .....           | 9     |
| V. LIMIT OF PUNISHMENT .....       | 10-11 |

#### I. "DRUNKENNESS" DEFINED

1. Any intoxication which is sufficient to sensibly impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of this Article. It is not a defense that accused, though under the influence of liquor, managed to "get through and somehow perform the duty" (12-540).

2. It is immaterial whether the drunkenness be induced by liquor or drugs (12-127). But when the "drunkenness" is induced by a combination of liquor and a drug, the latter having been prescribed by a physician as medicine, and there is no positive proof that the resulting incapacity was due solely to the alcohol, the accused should not be convicted of being "drunk" (43-343).

#### II. "ON DUTY" DEFINED

3. A post commander, while present and exercising command as such, is deemed to be at all times on duty in the sense of this Article, and thus liable to a charge under it if found drunk at the post. Likewise a medical officer of a post may be deemed to be on duty in the sense of this Article the whole day, and not merely during the hours prescribed for "sick call" visiting the sick, or attending at the hospital (12-127). When an accused was found drunk while in a duty status at the place where he was required to be for duty, it is not necessary to show that he was drunk while actually performing duties (46-281).

3a. Accused, who was executive officer of the garrison of an island outpost which had been shelled by a hostile submarine 2 months before, and the troops were cautioned "to be especially alert," was found drunk in his quarters at 10:30 p. m. when he was not required to be in his office. Held that, under the circumstances, he was on duty at all times within the meaning of this Article (42-105, 106).

3b. A medical officer of the day, under obligation to be available

on call, is on duty at all times within the meaning of this Article (42-163, 164).

3c. The executive officer of a battalion in a "combat zone" is continuously "on duty" within the meaning of this Article, although on a particular day he has no specific duties to perform (43-142).

3d. The commanding officer of a Coast Artillery Antiaircraft Battalion attached to a Field Artillery Brigade in bivouac in a combat zone was held to be continuously "on duty" within the meaning of this Article, although he had no tactical control over the units of his battalion but was in administrative control of his battalion and was also on duty as adviser to the brigade commander in antiaircraft matters (44-284).

4. A commanding officer of a unit of troops stationed at an advanced base located in a defense area, officially defined an area subject to attack, is in a constant duty status. The absence of any hostilities in the area for several months, or bad weather rendering attack unlikely, are circumstances affecting the amount of diligence necessary to maintain a condition of preparedness for attack, but the duty so to be prepared is constant (44-513).

5. An officer, drunk when reporting in person to a commander to whom he has been ordered to report for duty, is chargeable under this Article; also an officer who is drunk when reporting, as officer of the day, to his commanding officer for orders (12-127).

6. If an officer or soldier is found drunk at a time when he is required to enter upon a duty, and is not permitted to assume the duty, he is not guilty of a violation of this Article; but if, being drunk, he actually enters upon the duty, he is then drunk on duty and chargeable under this Article although he was drunk before he went on duty. The Article prescribes not that the person shall *become* drunk on duty, but that he shall *be found* drunk on duty (12-127).

7. An officer found drunk while absent without leave from his command and duty is not drunk on duty in violation of this Article, but is guilty of violation of the 96th (General) Article (12-148).

### III. DRUNKENNESS NOT ON DUTY

8. This offense is punishable under Article 96, or, in the case of an officer, Article 95 (Unbecoming Conduct) (12-148, 488).

### IV. SPECIFICATIONS

9. The time and place must be alleged with sufficient certainty to enable accused to prepare his defense. A specification alleging that accused was drunk on duty "at divers times between May 20 and June 7" was considered of doubtful certainty, but upon a statement by the prosecution that it would prove that accused was drunk during

practically the whole period specified, a plea in abatement was withdrawn and the error held to be harmless (30-1523) (40-428 [10]). Evidence that the accused was intoxicated on occasions other than the one alleged in the specification is improper and prejudicial to the accused (40-395 [7]).

## V. LIMIT OF PUNISHMENT

10. The punishment for the offense of being found drunk on duty is not limited except as specified in the executive order limiting punishments (M.C.M. 117c) and, when not so limited, rests in the discretion of the court (12-543). In the case of a noncommissioned officer a sentence of reduction to the grade of private, without other punishment, is legal (30-Sup. 1389) (40-443 [2]). When reduction is not included in the original sentence it cannot be added by proceedings in revision (40-397 [6]). See Article 40 (Limitation Upon Prosecutions As to Number) and Article 52 (Rehearings).

11. An accused was convicted of being "drunk on post" in violation of Article 86 (Misbehavior of Sentinel). The evidence showed that he was sober when posted but about an hour later he was found lying on the ground, drunk, about 300 yards from his post. The reviewing authority mitigated the offense to "being drunk on guard in violation of Article 96 (General Article)." This action was held to be, in essence, a finding that accused was drunk on guard duty in violation of Article 85, and that accused should be punished accordingly (43-309).

\* \* \* \*

*ARTICLE 86. MISBEHAVIOR OF SENTINEL. Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct. (See M.C.M. 174).*

## ANNOTATION

1. A sentinel is "upon his post" within the meaning of this Article when he is walking a designated sentinel's post, or when stationed in observation against the enemy, or on post to maintain internal discipline, or to guard property, or prisoners in confinement or at work (12-128; 30-1548) (40-444 [3]).

1a. A sentinel who goes beyond the normal limits of his post in carrying out his orders for the protection of adjoining property, is "upon his post" within the meaning of this Article (42-363).

1b. A sentry who was sober when posted, but about an hour later was found lying on the ground, drunk, 300 yards from his post, is not guilty of being "drunk on post," but may be convicted of the lesser offense of being drunk while on guard duty in violation of Article 85 (43-309).

2. Sleeping on post and leaving post before being relieved are distinct offenses and the latter is not a lesser offense included in the former (30-1548) (40-444 [2]). Loitering on post in violation of (General) Article 96 is not a lesser offense included in a charge of sleeping on post under Article 86; and failure to perform duty as a sentinel in violation of Article 96 is not included in, and may not be substituted for, a charge of sleeping on post, or one of leaving post before being relieved, laid under Article 86 (30-1483) (40-444 [2] [4]).

3. It is no defense to a charge of sleeping on post that accused was tired out from excessive guard duty, or that through lax discipline similar offenses had been allowed to pass unnoticed, or that the accused was irregularly or informally posted as a sentinel; but evidence of such circumstances may be received in extenuation or mitigation. An officer who places a soldier on duty as a sentinel when, from fatigue, or other disability, the soldier is incompetent to perform such important duty, renders himself liable to charges (12-540, 541).

4. Military police may be used for interior guard duty and if found asleep on such duty may be tried under Article 86 (Misbehavior of Sentinel) or Article 96 as the circumstances warrant (30-1548) (40-444 [1]).

5. Any military guard on interior guard duty is a sentinel within the meaning of this Article regardless of the nature of his duties, and his post and limits are determined by the character of his duties. A guard is "posted" as a sentinel when he is performing the guard duties to which he has been assigned (44-99). A member of a section occupying a search-light and antiaircraft gun position, was placed "on guard." Though not formally posted or described as a sentinel, he was charged with the watchfulness and special vigilance which characterize the duties of a sentinel, and his conviction of a violation of this Article was sustained (44-146, 147). Accused was a member of a three-man outpost in which one man was to be actually on watch while the other two were to remain near by to be of assistance if needed. All three men left the post and its vicinity before being properly relieved. There was no proof that accused was "on watch" at the time they abandoned the post. Held: Accused could not be convicted of a violation of this Article, but that he was guilty of a violation of Article 96. When not actually on watch his duty was merely to be available if needed. Such duty did not involve the special duty of vigilance required of a sentinel (45-138).

6. A member of a "guard of honor" over the remains of a deceased soldier is not on duty as a sentinel within the meaning of this Article (30-Sup. 1548) (40-444 [3]).

7. Accused was convicted of sleeping on post. The evidence showed that the sergeant of the guard found accused "lying on a bunk in a tent which was within his post" and that accused jumped up at once and resumed walking his post. Held, that the evidence was not sufficient to establish that accused was asleep (42-106).

8. Although the expression "found sleeping upon his post" is used in the Article, the offense denounced is the act of sleeping on post rather than apprehension in the act. The exception of the word "found" by the court in its finding is immaterial (45-137, 138).

\* \* \* \*

*ARTICLE 87. PERSONAL INTEREST IN SALE OF PROVISIONS. Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessities of life brought into such garrison, fort, barracks, camp, or other place for the use of the troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct. (See M.C.M. 175). (See A.W. 44).*

*ARTICLE 88. UNLAWFULLY INFLUENCING ACTION OF COURT. No authority appointing a general, special, or summary court-martial nor any other commanding officer, shall censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise, by such court or any member thereof, of its or his judicial responsibility. No person subject to military law shall attempt to coerce or unlawfully influence the action of a court-martial or any military court or commission, or any member thereof, in reaching the findings or sentence in any case, or the action of an appointing or reviewing or confirming authority with respect to his judicial acts. (As amended by S.S.A. '48, effective Feb. 1, 1949). (See M.C.M. 87b).*

#### ANNOTATION

1. Although this Article, in its present form, was not enacted until 1948 (effective Feb. 1, 1949) it has been a well established principle of military law for many years that it is the duty of a court-martial to decide all interlocutory questions as to the admissibility of evidence and the final question of accused's guilt of its own volition, upon its independent judgment, without advice, assistance, or in-



structions from any outside authority, and that unauthorized interference with the functions of the court-martial constitutes prejudicial error and nullifies the proceedings (40-395) (45-88, 423). See also Article 37, Annotation, pars. 67, 67a and 67b.

2. This is not a punitive Article, in that it provides no penalty for its violation. It would seem, however, that a violation of this Article by any person subject to military law would constitute an offense chargeable under Article 96.

*ARTICLE 89. GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED. All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or wrongfully destroys any property whatsoever or commits any kind of depredation or riot, shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him refuses or omits to see reparation made to the party injured, insofar as the offender's pay shall go toward such reparation, as provided for in article 105, shall be dismissed from the service, or otherwise punished, as a court-martial may direct. (As amended by S.S.A. '48, effective Feb. 1, 1949). (See M.C.M. 176).*

#### ANNOTATION

1. When a camp commander delayed for nearly two years to act upon the complaint of a property owner as to depredations committed by soldiers, it was held that if upon investigation it should appear that the officer had been negligent in the matter he should be tried or required to pay the damage himself (30-631) (40-447). And an officer who fails to collect the amount of damage assessed against enlisted men for a depredation under Article 105 (Redress of Injuries to Property) before they are discharged may be held responsible for the amount of the damage (40-447).

2. This Article is to be construed in connection with Article 105 (Injuries to Property) under which other pertinent decisions may be found.

3. Confinement in a penitentiary is not authorized for the offense of rioting or attempting to commit a riot because they are not punishable by imprisonment for more than a year by any Federal statute (43-236, 378).

4. Rioting is a tumultuous disturbance of the peace by three or more persons acting with a common intent either in executing a lawful enterprise in a violent and turbulent manner to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent manner. In a joint charge for this offense it is unnecessary to set forth the particular acts of each rioter (44-143, 145).

Those who deliberately remain in the rioting group, except for the purpose of quelling the disturbance, are *prima facie* participants in the riot (45-178).

\* \* \*

**ARTICLE 90. PROVOKING SPEECHES OR GESTURES.** *No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct. (See M.C.M. 177).*

#### ANNOTATION

1. An officer who addresses insulting language to another, no matter how great the provocation, is guilty of a violation of this Article (12-503).

1a. A charge of using provoking language to an officer in violation of this Article does not include, as a lesser offense, one of disrespect in violation of Article 63 (40-448).

\* \* \*

**ARTICLE 91. DUELING.** *Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct. (See M.C.M. 178).*

#### ANNOTATION

1. A challenge within the meaning of this Article must be a deliberate invitation, express or implied, to engage in personal combat with deadly weapons with a view to obtain satisfaction for wounded honor (12-124).

\* \* \*

**ARTICLE 92. MURDER—RAPE.** *Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: Pro-*

vided, *That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.* (As amended by S.S.A. '48, effective Feb. 1, 1949.) (See M.C.M. 179.)

### ANNOTATION

|                                  | Pars. |
|----------------------------------|-------|
| I. IN GENERAL .....              | 1-3a  |
| II. MURDER .....                 | 4-6k  |
| III. RAPE .....                  | 7-7h  |
| IV. DISHONORABLE DISCHARGE ..... | 8     |

### I. IN GENERAL

1. The jurisdiction conferred by Articles 92 and 93 (Various Crimes) is not exclusive, but concurrent with that of civil courts (12-133). But a state court has no jurisdiction over a crime committed on a Federal reservation over which the United States has exclusive jurisdiction. The jurisdiction in such case is exclusively Federal and is concurrent in the United States civil courts and courts-martial (30-1430) (40-p. 6-10). See Art. 74, Anno. par. 10a. Prisoners of war may be charged under Articles 92 or 93 in appropriate cases (45-329).

2. A general court-martial has jurisdiction over the crimes of murder and rape committed in time of peace, as well as war, in all places outside the "geographical limits of the States of the Union and the District of Columbia". Thus a person subject to military law is amenable to trial by court-martial for murder or rape committed, in peace or war, in the Philippines, Puerto Rico, the Canal Zone, Hawaii, Alaska, or any other place not within the territorial limits of the United States proper (30-1430) (40-450 [1]).

3. Under this Article if the offense is committed within the continental limits of the United States in time of war and court-martial charges are preferred, but before the proceedings are completed peace is declared, the sentence legally cannot be promulgated (12-562).

3a. The death penalty not being madatory, a conviction may be had under this Article by a vote of two-thirds of the members of the court present when the vote is taken, notwithstanding the minimum sentence authorized for murder (life imprisonment) requires a three-fourths vote, and a death sentence would require a unanimous vote (45-128-132). See Art. 43, Anno., par. 4a.

### II. MURDER (See M.C.M. 179a)

4. The qualification "in time of peace" means peace in a complete sense, officially declared. However, in 1920 it was held that as con-

ditions in the United States were then tantamount to those of peace, a soldier should not be tried by court-martial for murder in the United States unless the circumstances of the case indicated that such action would best serve the ends of justice (30-1430) (40-450 [1]).

5. A crime which is in fact murder cannot be brought within court-martial jurisdiction by charging it as manslaughter under Article 93. If the specification or proof shows that it is, in fact, murder, a court-martial has no jurisdiction in peace time unless outside the territorial limits of the United States and District of Columbia (12-143).

6. A specification alleging a homicide without adding the words "with malice aforethought", or words to that effect, is an allegation of manslaughter only (12-541). And when the court finds the accused guilty of a homicide except the words "with malice aforethought" it is a conviction of voluntary manslaughter (40-450 [2]). A homicide committed when drunk, and not shown to be "willful or malicious," is involuntary manslaughter (40-Sup. 451 [50]). When an accused was not sufficiently intoxicated to render him incapable of a general criminal intent, and he intentionally fired several rifle shots into a barrack room containing soldiers in bed and asleep, one of whom was killed thereby, it was held that accused was conclusively charged with knowledge that his act would "probably cause the death of, or grievous bodily harm to," one or more soldiers in the room, and a conviction of murder was sustained (45-179). For attempt to murder. See Art. 96, Anno., par. 17b. In order to justify a homicide committed pursuant to lawful orders and in the performance of duty, it must appear: (a) that the order or authority under which the accused acted was lawful, or of such character that the accused had a right to, and did, believe it to be lawful; (b) that he acted reasonably within the scope of such authority; and (c) that his act was not committed with malice, or criminal intent. When a soldier posted as a guard over Government property in Italy, intentionally lured a gang of Italians (who the soldier knew were engaged in theft and black-market operations) to come to the post at a time when he would be on guard and, upon a prearranged signal, would let them enter, but when the Italians were effecting their entry through a fence, after an exchange of signals as agreed upon, the guard fired upon them, killing two of the gang, and there was evidence that the guard had boasted that he was "going to get" the leader of the gang, the guard was convicted of murder and the conviction was sustained (48-27, 28). The defense of legal justification prevails whether the offense be murder or manslaughter in either degree. The general rule is that the acts of a subordinate soldier or officer done in good faith, and without malice, in compliance with his supposed duty, are justifiable, unless such acts are manifestly beyond the scope of his authority and such that a man of ordinary

sense and understanding would know to be illegal. The courts have held that one carrying out a lawful order or duty is not required to weigh with scrupulous nicety the amount of force necessary; the exercise of reasonable discretion is all that is required. To deprive an accused of this defense, it is not enough that he committed an error of judgment, but it must be a willful and malicious error. A soldier on guard over valuable property of the United States in occupied Japan, armed with a carbine containing only three shells fired upon an intruding Japanese civilian, after proper challenge. After the first shot which went over his head, the intruder kept running, and the accused fired again, whereupon the intruder fell but got up, and accused then fired his last shell and missed. Accused then approached the deceased and struck him with his carbine, knocking him down and breaking the gun. Deceased then tried to get up again whereupon accused picked up a rock and beat him on the head with it several times. Accused kept calling for the corporal of the guard and soon another sentry came. The deceased remained conscious for about three hours and died in the hospital where he was taken for treatment. The sentry was tried for manslaughter and a verdict of involuntary manslaughter was disapproved on the ground that accused, at most, was guilty of no more than a mistake in judgment, and that the homicide, having been accomplished by the accused in the execution of his duties as a sentinel, was legally justified (48-31, 32). This is a close decision, and is cited here to show that it is the policy of the Judge Advocate General's Office to protect a sentry in the discharge of his duty to the fullest extent of the law.

6a. An accused, while in an area which was "off limits," was arrested by the sergeant of the guard and in attempting to escape he shot and killed the sergeant. Held, that while evidence of malice aforethought is necessary in a prosecution for murder, an intent to impose force to a member of the guard, known to the accused to be such, in order to escape from lawful custody, constitutes the requisite malice (42-106).

6b. When the accused and deceased quarreled two days before accused shot and killed deceased, and also had an altercation in the day room a few minutes before the shooting, following which the accused left the room, walked some distance to his barracks, sat on his bed and meditated several minutes, then armed himself with a service rifle, returned to the day room, and without warning, fired the fatal shot, every element of the offense of murder was established (43-187, 188). But when, after an altercation in which accused had been "pushed and threatened" by deceased, accused went to his barracks and got an unloaded rifle and ammunition, and on his return deceased threatened to hit him with some bottles and advanced, holding the bottles above his shoulders, whereupon ac-

cused warned him, then loaded his rifle and fired a shot into the ground, and deceased then dropped the bottles and sprang at accused, who shot and killed him, it was held not to be murder, but voluntary manslaughter. A plea of self-defense was rejected because, although at the time of the fatal shot accused may have thought that he was in great danger, such belief was not shown to be reasonable. Furthermore he might have retreated and avoided or lessened the danger. Under all circumstances the killing was considered as having been done in the heat of passion. As the accused himself testified, he "lost his head" (43-340, 341). See par. 6f, this Annotation, as to self-defense.

6c. The law recognizes the fact that a man may be provoked to such an extent that, in the heat of passion, and not from malice, he may strike a fatal blow before he has had time to control himself. This is voluntary manslaughter (M.C.M. 180a). But when sufficient time elapses between the provocation and the killing to allow accused to regain control of himself, even though he is still "mad", it is murder (43-188) (44-343). And when the provocation was limited to grabbing accused by the collar and pushing him around, no blows being struck or threatened, and accused then chased deceased and killed him, it was held that the provocation was not adequate to reduce the offense to manslaughter (43-382) (47-294).

6d. Following an altercation with, and threats to, a dining room orderly in the mess hall, accused went to his barracks, got a rifle and loaded it. Other soldiers told him not to take the gun, but he said he was only "going to scare the orderly." He returned to the mess hall and called to the orderly who came toward him empty handed. As the orderly reached his hand out to the muzzle of the rifle, the gun went off, killing him. Held, murder (43-309).

6e. An accused who had been drinking (but there was no evidence that he was so drunk as not to know what he was doing), after a ride in a taxi, got out, asked the amount of the fare, but instead of paying it, shot and killed the driver. No provocation or excuse was shown. He then took the car and drove 70 miles to a hotel where he registered, at which time the hotel clerk considered him sober. A conviction of murder was sustained (43-309).

6f. In a murder case, evidence of the deceased's character is not admissible when there is no basis for a claim of self-defense (43-339). A plea or claim of self-defense cannot be sustained unless it is supported by facts to show that accused must have reasonably believed that he was in danger of death or great bodily harm and that it was necessary to kill his adversary to avert the danger (43-340). In this connection the character of the deceased may be pertinent especially if he was known to the accused to be of a quarrelsome and violent disposition. See also, Article 93 (Various Crimes) Annotation, par.

74b. A person who is justified in taking the life of an aggressor in self-defense does not forfeit such right by arming himself in anticipation of possible trouble; and if an innocent bystander is unintentionally killed by a shot fired in justifiable self-defense, and there is no evidence that the firing was done wantonly or recklessly, or that the right of self-defense exceeded permissible limitations, the person who fired the fatal shot is not criminally responsible for the homicide (46-208). An accused who had committed a felony (robbery) and was in custody of three military policemen, removed a pistol from the holster of one of them and, holding the pistol in a threatening manner, started backing away to escape, whereupon he was shot and wounded by one of the policemen. The accused then shot the policeman, killing him. Held, that under the existing circumstances it was the right and duty of the policeman to shoot the accused, and accused cannot claim self-defense or that his act was committed in the heat of passion caused by adequate provocation. A conviction of murder was sustained (46-209).

6g. The accused (prisoner) and another prisoner were in a jeep with a guard. Accused testified that he had a sudden pain in his stomach, was falling, and the guard reached to catch him, when the other prisoner hit the guard on the head and killed him. The accused and the other prisoner then escaped. There was no other evidence that accused assisted in the murder or knew in advance that it was to be done. Conviction disapproved. The fact that accused escaped when the opportunity arose does not warrant an inference that he joined in planning the escape and became thus equally guilty with the one who struck the fatal blow (See Article 69, Annotation, par. 29). Likewise no inference of guilt can be drawn from accused's testimony unless it be presumed, first, that it was false as to the sudden pain, and, second, that the feigned illness was in accordance with a prearranged plan. A presumption cannot be based upon another presumption, nor upon a mere conjecture (43-339).

6h. Accused and another soldier were traveling in a taxi. The other soldier proposed that they rob the driver. When the driver stopped, the accused walked away behind the car, but he saw and heard the other soldier kill the driver and helped him carry the body away. The evidence was held to support the conclusion that the accused aided and abetted the commission of robbery and was therefore legally sufficient to support the finding of guilty of the murder which resulted. The conviction of murder was sustained notwithstanding that the accused was acquitted of robbery because inconsistent verdicts of guilty and not guilty do not vitiate the former (44-284, 285). See Art. 96, Anno., par. 26. But when there is no evidence of preconcerted action by an alleged accomplice, or that he

committed any intentional overt act in aid of the crime, his guilt cannot be inferred merely from his presence thereat (46-155, 156; 207, 208). However, when two accused proceeded together to a "geisha house district," armed with carbines and a can of gasoline, to "get" a certain geisha girl at whom they were angry, and to "burn down the district," and in an altercation which resulted one of them, apparently recognizing the girl for whom they were looking, fired two shots into a crowd of about fifteen people and one of the shots killed a soldier, and each accused testified that the other had fired both shots, it was held that it was unnecessary to determine which accused fired the fatal shot since the evidence that it was fired by one of them while in the execution of their unlawful design was sufficient to sustain a conviction of murder as to each (46-281, 282). Two accused, with a sailor and a Filipino civilian, went to a certain Naval Air Base boat pool to steal a landing craft. Two of these men overpowered and disarmed a civilian guard, and while they were all trying to get the boat under way, the guard eluded his captors. Failing to get the boat, and fearing that the guard might summon aid, all four left the area. The guard was immediately recaptured by some of the men and beaten into insensibility with the butt of his carbine and a rock. As a result of his injuries the guard died. Each accused denied having personally struck the guard but each admitted being present while the guard was beaten. Held, the killing of the guard was incident to, and part of, the attempted larceny of the boat, and consequently all were *particeps criminis* in the resulting murder, notwithstanding the plan to steal the boat had been abandoned before the guard was killed (48-26, 27).\*

6i. A homicide committed in the perpetration, or attempt to perpetrate another felony (e.g. robbery) is murder. An intent to kill is not a necessary element in the crime of murder when the design is to commit a felony and the homicide occurs in carrying out such purpose (44-285). In a rape case, when the victim, who was confined to her bed with acute heart trouble, died immediately after the attack, a conviction of both rape and murder was sustained (45-188).

6j. One who inflicts a blow or a wound upon another which alone is not fatal, but which devolves into, or initiates a disease or affliction which causes death, is criminally responsible. When a deceased died of gangrene which was shown to have developed from a stab wound inflicted by accused 18 days before, and there was no other

\* Participation in a felonious enterprise of which homicide is a result, constitutes a basis upon which malice for all the participants may be inferred, and each bears a liability equal to that of the one who actually commits the homicide; and this may be so when the felonious enterprise is the proximate cause of the homicide although the homicide may have been committed by one other than a participant therein (49-70). This case was a joint trial of seven accused. It was probable that others were involved who were not detected. It grew out of a raid upon a Government warehouse which was broken up by a law enforcement detail, one of whom was killed and two others wounded in the course of considerable shooting which occurred. The individual who fired the shot which caused the homicide was not identified. A conviction of five accused of housebreaking, assault with intent to do bodily harm with a dangerous weapon, and murder, was upheld.



intervening cause, a conviction of murder was sustained (44-285, 286).

6k. When an assault is committed with the intent to murder a certain person, and another person is killed thereby, it is murder (44-343). See par. 6i *supra*. It is to be noted that in this Article, as amended, there is an important distinction between "murder" and "murder not premeditated." Murder is the unlawful killing of a human being with malice aforethought (M.C.M. 179a). The mandatory punishment for murder is death or life imprisonment, while that for murder *not premeditated* is "as a court-martial may direct." It is clear that the death penalty cannot be adjudged for unpremeditated murder. Article 43 provides that the death penalty cannot be awarded "except for an offense in these Articles expressly made punishable by death." Furthermore, the new Manual for Courts Martial, Appendix 4 (Forms for Charges and Specifications), under Article 92 (Forms 81 and 82) shows separate specifications for "Murder (premeditated)" and "Murder (not premeditated)." Their language is identical except that the first contains the phrase "with premeditation," which phrase is omitted from the second. This indicates that in order to support a death sentence a murder must be *alleged* and *proved* to have been committed *with premeditation*, otherwise it must be treated as murder not premeditated and punished "as a court-martial may direct." (See also M.C.M. 115 and 116.)

### III. RAPE (See M.C.M. 179b)

7. "Statutory" rape is chargeable under Article 96 but not under Article 92 (30-1485) (40-454 [88]). See Article 96, Annotation, par. 17. A specification under Article 92 alleging that accused "did forceably and feloniously, against her will, have carnal knowledge of X, a female under sixteen years of age" (both common-law and statutory rape) is duplicitous, but not fatal error. The averment that the victim was "under sixteen years of age" may be disregarded as surplusage (46-336).

7a. In a prosecution for rape, evidence of facts showing that accused had carnal intercourse with the victim by force, and that her lack of resistance was attributable to her fear of great bodily injury or death, is sufficient upon which to base a finding that she did not consent (42-363, 364). When the victim is in a state of stupefaction, lack of consent is obviously apparent. Proof thereof, in such case, is unnecessary; and proof of force, other than the act of penetration itself, is not requisite. Proof of penetration need not be direct, nor is it necessary that it be shown by testimony of the victim; such proof must be beyond a reasonable doubt, but it may be circumstantial (44-147). A conviction of rape cannot be sustained when the victim positively denies that there was any act of sexual intercourse, and

other evidence upon that point is inconclusive. The lesser included offense of assault with intent to commit rape in violation of Article 93 was substituted (46-336, 337).

7b. Evidence of a complaint made by a victim of rape shortly after the offense was committed is admissible in corroboration of her testimony relative to the *corpus delicti* (43-8).

7c. The question whether an alleged victim of rape consented to intercourse depends upon the circumstances and relative strength of the parties rather than the presence or absence of bruises or other physical injuries. When six accused overpowered a woman and made threats against her life, and each of the six assailants had carnal knowledge of her, a conviction of rape was sustained as to all the accused (43-310).

7d. Although reluctant consent by the woman (if she is over the statutory age of consent) negatives the offense of rape, there is no consent when the victim ceases resistance under fear of death or other great harm (43-310).

7e. In the case of a child victim of rape, the vaginal orifice had not been disturbed, but there was some injury to the surrounding tissue. Furthermore the accused was shown to have gonorrhea which disease the victim developed a few days after the attack. Entry of the lips of the female organ, without rupture of the hymen or laceration of the vagina is sufficient to constitute rape. Conviction sustained (43-310).

7f. When a court-martial has imposed a sentence of confinement at hard labor for life the reviewing authority may, after approving the sentence, reduce the period of confinement to a definite term of years (43-379). See Article 51.

7g. Two or more persons cannot be guilty of a single rape; but all persons present aiding and abetting the crime are guilty as principals. It follows that the joinder of the several principals, including those aiding and abetting the crime, is not improper (44-61, 62).

7h. In a prosecution for common-law rape, or assault with intent to commit rape, evidence tending to show the unchaste character of the complainant is admissible on the issue of the probability of her having consented to the act and of her credibility, and for this purpose her lewd habits, associations and specific acts of illicit sexual intercourse or other lascivious acts with accused or others may be shown, whether prior to or after the commission of the alleged rape (47-67).

#### IV. DISHONORABLE DISCHARGE

8. The power to impose dishonorable discharge is inferred from the power to impose life imprisonment, but it must be expressly included in the sentence—it will not be implied (30-1387, 1402) (40-402 [4]). A dishonorable discharge with total forfeitures may

be imposed with life imprisonment under this Article (43-427) (M.C.M. 116).

*ARTICLE 93. VARIOUS CRIMES. Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct: Provided, That any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article. (As amended by S.S.A. '48, effective Feb. 1, 1949). (See M.C.M. 180).*

#### ANNOTATION

|   | Pars.  |
|---|--------|
| I. ASSAULT WITH INTENT TO COMMIT A FELONY ..... | 1-11   |
| II. ASSAULT WITH INTENT TO DO BODILY HARM ..... | 12-20  |
| III. EMBEZZLEMENT .....                         | 21-33  |
| IV. FORGERY .....                               | 34-50  |
| V. HOUSEBREAKING AND BURGLARY .....             | 51-54  |
| VI. LARCENY .....                               | 55-73  |
| VII. MANSLAUGHTER .....                         | 74-74g |
| VIII. PERJURY .....                             | 75-83  |
| IX. ROBBERY .....                               | 84-89a |
| X. SODOMY .....                                 | 90-94  |

#### I. ASSAULT WITH INTENT TO COMMIT A FELONY

(See M.C.M. 180k)

1. When an assault is committed in furtherance of a felonious intent, and the felony is accomplished, it is a duplication to charge both the assault and the felony, but if the sentence imposed is sustained by the felony alone the error is not prejudicial; and when an accused is charged in one specification with an assault to commit a felony he should not be charged in another specification with the same assault as with intent to do bodily harm (30-1555) 40-428 [5]).

2. Assault with intent to commit robbery does not include the offense of assault with intent to do bodily harm, and when in such case the court, under a charge of assault with intent to commit robbery, by exceptions and substitutions, convicted accused of assault "with intent to do bodily harm", the quoted words were treated as surplusage and the conviction treated as one of simple assault (30-1555) (40-451 [3]).

3. Assault with intent to rape a four-year-old child includes the

statutory offense of abuse and maltreatment of a child under eighteen years of age (30-1555) (40-451 [2]).

4. Assault with intent to commit an offense which is not penal under the Federal law, but which is denounced by the law of the state within whose confines a Federal reservation upon which the assault was committed is located, is under section 289 of the Federal Penal Code punishable as provided by the state law (30-1556) (40-857) (M. L. U. S. 857).\*

5. Where accused threatens to kill a certain person and immediately procures a dangerous weapon and attempts to attack such person with it, but is prevented by third persons from making an actual attack, he is chargeable, nevertheless, with an assault with intent to commit murder; but where there is a mere threatened attack if accused himself should be attacked, and no attempt by accused to initiate an attack, there is no assault (30-1557) (40-423 [1], 451 [2]).

5a. In a prosecution for assault with intent to murder, an inference as to the accused's intent may not be based solely upon his statements or threats if his acts show a different intent. The actual intent must be gathered from all the circumstances, acts as well as statements (43-382). The phrase "intent to kill" is not synonymous with "intent to murder" in that it lacks the element of premeditation and deliberation which is an essential element in an intent to murder. The limit of punishment for an "assault with intent to kill" is that prescribed for an assault with intent to commit voluntary manslaughter (44-11). But when, under a charge of assault with intent to commit murder, facts are established showing that, had death ensued, the homicide would have been murder, a conviction of assault with intent to murder is justified (44-11, 12). Accused and others were convicted of assault with intent to murder by wilfully and feloniously shooting at a group of military policemen with rifles. There was no evidence that this particular accused fired any of the shots, but he was a party to the common design, was present with the other accused when the crime was committed, making provocative remarks and otherwise furthering the enterprise. Under the Federal statutes any person who assists, abets or induces the commission of an offense under any law of the United States is a principal and may be charged directly with the commission of such offense (44-188, 189).

6. A physical attack may be committed lawfully. If the court, in its findings, excepts the words alleging the felonious intent, the specification is left impotent so far as the charging of a crime is concerned (30-1557) (40-451 [1] [5]).

7. Under a charge of assault with intent to commit rape, the use

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\* The term "any felony" as used in this Article includes both felonies at common law and by statute. All larcenies were felonies at common law irrespective of the value of the property involved, consequently an assault with intent to commit larceny may be charged as an assault with intent to commit a felony under this Article (49-11).

of some force or violence to accomplish sexual intercourse must be shown (30-1557) (40-451 [2]) (43-189). Circumstantial evidence may be sufficient. When an accused forced his company upon his victim with comments indicating a carnal desire, then, by force, took her across a street into some bushes where it was dark and knocked her down, and there was no robbery, it was held that an inference of intent to commit rape was warranted (43-188, 189). Amorous advances or caresses, to which the woman does not object, do not constitute an assault under Article 93 or 96, when the accused desists as soon as apprised of her refusal to submit further (44-147).

8. A specification charging an assault with intent to commit a felony must contain a word or words stating or implying that the alleged act was wrongful, unlawful, or felonious. It must be so drawn that if the allegations therein are proven, the accused cannot be innocent. The word "assault" implies an unlawful act. Therefore a specification alleging an assault with intent to commit a named felony is sufficient although the word "feloniously" is not used; and a specification alleging an "assault with intent to kill" a certain person is sufficient; but a specification alleging that accused did "with intent to kill, shoot another soldier", or "did, with intent to do bodily harm, strike R on the head with a hammer", would neither be sufficient because the shooting or the striking might have been justified, and there being no allegation that the act was done with wrongful intent, no crime is charged. The employment of the word "assault" would have supplied the necessary element of unlawfulness (30-1559) (40-451 [1] [8]).

8a. Assault with intent to commit manslaughter is a lesser offense included in a charge of assault with intent to murder (40-451 [3]).

9. The specification may not be amended on trial so as to charge an assault upon a person other than the one named therein, as such amendment would change the specification so as to charge a wholly different, and not included, offense (30-1559) (40-428 [9]). Likewise when the accused was charged with assault upon a certain named member of the Military Police, and the court found accused guilty of an assault upon "a member of the Military Police" without naming him, the variance was held fatal (30-1560) (40-454 [6]).

10. When the weapon with which an assault is alleged to have been made is named in the specification, and it is *per se* a dangerous instrument (*e.g.*, a razor) the failure to describe it as a dangerous instrument is not fatal to the specification (30-1559) (40-451 [3] [8]).

11. Under a charge of assault with intent to commit a felony under this article, accused may be convicted of a simple assault in violation of Article 96, but not of an assault and battery (30-Sup. 1560) (40-451) [4]).

II. ASSAULT WITH INTENT TO DO  
BODILY HARM

(See M.C.M. 1801-m)

12. The law regards an assault as one made with intent to do bodily harm when such assault is accompanied by a threat to do bodily harm if a certain unlawful demand is not complied with (30-1557) (40-451 [10]) (45-279, 280).

13. Assault with intent to do bodily harm is a felony only when committed with a dangerous weapon, instrument or other thing. Therefore a conviction of "assault with intent to do bodily harm" only, will not support a penitentiary sentence, but "assault with a dangerous weapon with intent to do bodily harm" is a felony (30-1556) (40-399 [2]) (42-273) (43-427, 428).

14. As in assault with intent to commit a felony, so in assault with intent to do bodily harm, the specification must contain a word or words stating or implying a wrongful or felonious intent. When an accused was charged with "shooting T. in the body with a pistol feloniously and with intent to do bodily harm" and the court, in its findings, excepted the words "feloniously and with intent to do bodily harm" leaving merely a finding that accused did "shoot T. in the body with a pistol", the conviction was disapproved, there being no finding of an unlawful act (30-1557) (40-451 [12]).

14a. An accused (officer) was charged with an assault with intent to do bodily harm in two identical specifications, one under Article 93 and the other under Article 95. He was convicted of the charge under Article 93 and acquitted of the charge under Article 95. Held, not inconsistent, as proof of facts to support the charge under Article 93 might not be sufficient to warrant conviction under Article 95 (43-96).

15. An assault may be justifiable when committed in self defense (30-1558) (40-451 [9]).

16. In alleging an assault by pointing a pistol at a person it is not necessary to aver that the pistol was loaded. The character of the assault is determined by the specific intent charged, and the failure to allege that the pistol was loaded does not constitute a defect in the pleading. But if the evidence shows only the use of the weapon as a threat, it constitutes merely an assault with a dangerous weapon, a lesser offense in violation of Article 96 (40-451 [8]). But when an accused, in anger at an officer, drew his pistol and fired a shot so that it struck the ground about 18 inches from the officer's feet, it was held to constitute an assault with intent to do bodily harm with a dangerous weapon (44-379, 380).

17. When the accused was charged with an assault with intent to do bodily harm by striking with his fists, and the court, by exceptions

and substitutions, convicted him of an assault with intent to do bodily harm by striking with "a sharp instrument", it was held that a "sharp instrument" is not necessarily a dangerous instrument, and as neither the specification nor the findings describe a felony, the variance was immaterial. And so when the striking was alleged to have been done with a pistol and the proof showed it to have been a "billy", the variance was held to be immaterial as either instrument was capable of inflicting serious injury. And when the instrument was alleged to be a "lead pipe" and the evidence showed it to be a "gas pipe", the variance was held immaterial. But when, under a charge with assault by threatening to strike with his fist, the accused was convicted of an assault by striking with a riding crop, the variance was held fatal (30-1560). A finding that the instrument used was "dangerous" may be justified by evidence of the results of its use (40-451 [7] [11]) (43-428).

17a. An accused was charged with assault with intent to do bodily harm "by striking him in the stomach with a knife." The court excepted the words "striking him in the stomach" and substituted the words "threatening him." Conviction approved. The substituted words were merely descriptive of the manner in which the knife was used (43-428). But when under a charge of assault "with intent to do bodily harm with a dangerous weapon by shooting him with a rifle," and the court, by exceptions and substitutions, convicted accused of "carelessly discharging a rifle in his company area" it was held that the court's action introduced elements not included in the original charge and the conviction was disapproved (44-12).

18. When the court convicted the accused of an assault with intent to do bodily harm by pointing a weapon, to wit a pistol, at a person named, and the evidence showed only a simple assault with some implement the character of which was not disclosed, it was held that the conviction could not be sustained, nor could the accused be adjudged guilty of the simple assault proved because the implement used was not shown to have been a weapon as alleged (30-Sup. 156b) (40-451 [11]). A proper finding under Article 96 might have been reached by appropriate exceptions and substitutions (30-Sup. 1560b) (40-451 [9] [13]).

18a. To convict one of assault with intent to do bodily harm there must be proof of acts indicating that accused at least threatened, or offered, to use force against the body of the person alleged to have been assaulted (40-451) [6]). A menace of violence is not enough, for until the execution of the violence has actually begun there is no assault. There must be an offer or attempt to commit an assault. i.e. the commencement of some act which, if not prevented, would, in its apparent course, result in a battery (43-143) (47-177, 178).

Intoxication will not negative the intent when accused's actions indicate that he is not bereft of reason, but has a purposeful design to do bodily harm and the ability to carry it out (43-427, 428).

18b. The intent to do bodily harm may be inferred from the nature of the instrument used, the manner in which it is used, or the seriousness of the injury inflicted. When the thing used is not a dangerous weapon *per se*, it must be shown that it was used in such a manner as to be a dangerous instrument. This is best done by the seriousness of the injury inflicted. When an accused swung a chair at another soldier and the latter warded off the blow with his hand, receiving no injury, and there was no other proof of an intent to do bodily harm, it was held to be only an assault and battery in violation of Article 96 (43-310).

18c. An accused fired a pistol at X with intent to do bodily harm. Y intervened in an attempt to prevent the assault and was wounded. X was not harmed. The accused was convicted of an assault upon both X and Y with intent to do bodily harm with a dangerous weapon (44-286).

19. The offense of assault with intent to do bodily harm is one requiring the specific intent named, and where two are charged jointly with this offense each must have had such intent and there must have been a mutual understanding between them of each other's purpose, otherwise they are responsible only for what each personally intended (30-Sup. 1560) (40-451 [13]) (49-12). When there is a conspiracy to effect a joint escape in furtherance of which a sentry is assaulted by one of the conspirators, all are guilty of the assault, but not necessarily so in the absence of a conspiracy (30-1310) (40-454 [24]).

19a. When an accused and another soldier were "wrestling around just for fun," the other struck accused on the head with a stocking, and accused then rubbed the stocking over the other's face. An argument ensued and accused struck the other in the mouth with his fist, splitting his lip. Held, that there was not sufficient evidence to establish a specific intent to do bodily harm (43-99). A mere slap on the face with an open hand, no serious injury resulting, does not constitute an assault with intent to do bodily harm in violation of Article 93, but is an assault and battery under Article 96 (44-147).

19b. In an assault with intent to do bodily harm with a dangerous weapon (a knife), committed by two persons acting jointly and with a common intent, each using the weapon in turn while the other acted as "guard" each is responsible, not only for his own acts, but for the acts of the other. This rule is not affected by the failure to charge them jointly (45-179, 180).

20. Assault with intent to do bodily harm is not a lesser offense included in robbery (30-1450) (40-451 [59]) (43-20). Nor is it included in a charge of assault with intent to commit rape (45-89).



## III. EMBEZZLEMENT

(See M.C.M. 180g)

(*Note:* Under the amended Article the former distinctions between larceny and embezzlement do not exist. See note under the sub-head VI—Larceny—for further comments upon the simplified procedure in prosecutions for larceny and embezzlement. The following annotations under this sub-head (Embezzlement) are retained because they relate largely to methods of proof and certain principles which are applicable under the changed procedure.)

21. In order to support a conviction of embezzlement of funds there must be direct and positive evidence that some funds are missing and that accused is responsible therefor. "Readings" from a cash register, not proved to be a correct record, or statements of witnesses, who are not expert accountants, giving their conclusions as to the amount shown by certain records to be short, the records themselves not being produced, do not constitute sufficient evidence to prove a shortage. When the only evidence that accused was ever in possession of the embezzled funds is his own statement, a conviction cannot be sustained (30-1561) (40-395 [15] [25]).

21a. An officer was assignee of a certain collection agency when two employees of the agency embezzled its funds. Interested civilians charged that the embezzlement was made possible by the officer's carelessness. Held, that while the officer may be civilly liable, he was not guilty of fraud or immorality so as to warrant disciplinary proceedings (42-364).

22. A loan involves an element of trust in the borrower by the lender, and if the borrower violates that trust by pawning or selling the loaned article it constitutes embezzlement (30-Sup. 1563) (40-451 [18]).

23. When, in several specifications, the accused is charged with several embezzlements, none of which is more than \$50, they cannot be aggregated to justify punishment as a felony (30-1562) (40-451 [24]); but embezzlement from the same fund of different amounts over a period of time may be charged in one specification as a single embezzlement of the aggregate sum (30-1564) (40-428 [10], 451 [16]). When an accused was charged in one specification with embezzlement of several sums of money, entrusted to him by certain named individuals, aggregating \$226.50, a stipulation between the defense and the trial judge advocate changing one of the items from \$18.75 to \$29.25 was held proper as it neither altered the nature or increased the grade of the offense charged. Had the original specification alleged the embezzlement of \$18.75 and no more, the amendment would not have been authorized because it would have increased the authorized penalty (44-286, 287). (See Art. 46, Anno., par. 18.)

24. Embezzlement, like all crimes, must be proved beyond a reasonable doubt. A conviction cannot be sustained against a plea of not guilty when the only evidence of embezzlement was that the accused "failed to ring up in the cash register the full amount received and had raised the prices on articles sold without the knowledge of his superiors", and that when arrested he had certain sums of money and property in his possession which he had acquired during the time he was alleged to have committed the embezzlement (30-1563) (40-451 [17]). A conviction of embezzlement was sustained against a post exchange officer who ordered prices on certain articles marked down from \$124.25 to \$5, bought them himself at the marked down price and had them shipped to his wife. The circumstances of the transaction were held to clearly indicate the fraudulent intent of accused to embezzle the merchandise by means of the purchase device (48-29).

25. When an adult person receives large sums of money from others for which he is responsible and accountable, and wholly fails either to account for said monies or turn them over to the owners when his stewardship terminates, there is a natural presumption of embezzlement which is not necessarily overcome by his uncorroborated explanation however plausible it may be; and the return of the funds after charges are preferred is of no probative value except as an admission of his responsibility. It does not tend either to negative or excuse the embezzlement (30-1563) (40-451 [17]) (43-341, 382, 383) (44-189, 190, 344). Failure by an accountable finance officer to render his accounts for public moneys committed to his charge, which he is not authorized to retain as salary or emolument, is a violation of section 90 of the Federal Penal Code (M.L.U.S. 829). Such offense is committed when there is a failure to account for public moneys by the officer receiving the same, and may be complete without any actual embezzlement of the money. It properly should be charged (in such case) as a violation of Article 96 (46-282, 283).

26. An accused may be convicted of embezzlement upon the uncorroborated evidence of books kept by him in the course of his duties (30-1563) (40-395) [14]). Such records do not stand like a confession.

27. Where one soldier collects money for another from a third party, and upon being asked for it, admits having collected it but says he cannot pay it over until pay day and offers no explanation, there is a *prima facie* embezzlement (30-1563) (40-451 [17]).

28. In the prosecution of a company commander for embezzlement of company funds, failure to prove that the funds were entrusted to his care by "the regimental commander" as alleged in the specification, was held immaterial for the reason that, by virtue of his office as company commander, the accused was the custodian of the com-

pany funds and no further allegation or proof upon that point was necessary (30-1563) (40-451 [16]). A company supply officer is chargeable under this Article with embezzlement of funds entrusted to him for the payment of the company laundry bill (44-99).

29. The custodian of trust funds has no right to "borrow" the funds for his own use, and his act in so doing constitutes embezzlement although he intended to return the funds so borrowed (30-1563) (40-451 [18] [23]) (44-344). But when the subject of embezzlement was an automobile which the owner had lent to the accused for an indefinite time with permission to use it, it was held that there was no wrongful conversion of the automobile unless it be established that accused intended to permanently deprive the owner of it (30-Sup. 1563) (40-451 [19]).

30. As a rule the value of embezzled property should be alleged in terms, but in the case of negotiable instruments the law presumes their value to be the amount for which they are drawn (30-1564) (40-451 [16]).

31. Embezzlement of post exchange, company, or rations savings funds is chargeable under Article 93 rather than 94 (Frauds) because after payment to an organization, they do not come within the description of "money of the United States furnished and intended for the military service thereof" (30-1564) (40-452 [2]). Embezzlement of government military property is chargeable under Article 94. All other embezzlements should be laid under Article 93 (12-140) (40-451 [16]). Embezzlement or larceny of property of the Army and Air Force Exchange Service may be charged under either Article 93 or Article 94 (47-296).

32. Where accused was charged in four specifications with embezzlement of certain sums of money from four different sources, and on trial he accounted for a part of the whole amount, but there was nothing to show the particular funds so accounted for, a finding under each specification that the accused embezzled "a part thereof, amount unknown" was held proper (30-1565) (40-451 [23]) (43-383). But under a charge consisting of three specifications for the misappropriation of two lots of hay and a quantity of bran, the evidence showing only that accused used "a part of it," without indicating whether hay or bran, it was held insufficient to support a conviction under any of the specifications (30-1578) (40-452 [18]).

33. Variance between allegation and proof as to the nature of the embezzled property is fatal. Under a charge of embezzlement of money, accused cannot be convicted of embezzlement of merchandise of the value of the money alleged (30-1565) (40-451 [20]). And the embezzlement of property is an offense separate and distinct from the embezzlement of the proceeds of the property. So when an accused who was entrusted with cashing certain checks and bringing the pro-

ceeds to the owners, cashed the checks and absconded with the proceeds, and was tried and convicted of embezzlement of the checks, the variance was held fatal (30-1565) (40-451 [20]). But when the accused is charged with embezzlement of a certain sum, he may be convicted of embezzling a part of it (40-451 [23]) (42-21).

#### IV. FORGERY

(See M.C.M. 1801)

34. The offenses of forgery and uttering (passing) a forged instrument are distinct and separate offenses, but it is the practice in the Federal courts that when both offenses are involved in the same transaction only one penalty should be imposed (30-1566) (40-451 [25]).

35. In establishing a case of forgery it is not enough merely to show that accused signed another's name; it must also be shown that accused had no authority to do so (30-1567, 1569) (40-451 [29]); except that if the circumstances show guilty knowledge on the part of accused in uttering the forged instrument, no further proof is required (30-1568, 1569) (40-451 [28] [29]). Falsely personating another and signing his name is forgery if the signer's intent is to have it received as the instrument of such other person, and it is such as to have legal efficacy if genuine. The person whose name is forged need not be the one defrauded (44-287) (45-233, 234).

36. Drunkenness is a defense only where it is sufficient to negative specific intent, and the burden is on the accused to prove that his drunkenness prevented his forming the design to defraud (30-1568) (40-451 [28]).

37. Intent to defraud, or to work prejudice to the right of another, is an essential element in forgery. The forgery of a pass "with intent to deceive" is not a felony. Such offense should be laid under (General) Article 96 (30-1568) (40-451 [26] [28]). The limit of punishment now prescribed in the Table of Maximum Punishments (M.C.M. 117c) for this offense under Article 96 is dishonorable discharge, total forfeitures, and confinement at hard labor for three years.

38. Fraudulent intent may be established by circumstantial evidence. When a person forges a check payable to himself, indorses and cashes it, there being no other person who could benefit by the transaction, fraudulent intent is presumed (30-1568) (40-451 [29]).

39. A person who has possession of a forged instrument and attempts to cash it is presumed to have forged it. Thus a person who cashes forged checks, the checks themselves being in evidence, and there being nothing to rebut the presumption against him, may be convicted of forgery; but when an accused admits cashing a forged check but denies that he forged it, and there is no evidence as to who committed the forgery, the accused may be convicted of uttering, but not of forgery (30-1569) (40-451 [27] [30]).

40. An instrument bearing several signatures, some of which are genuine and others forged, is a forged instrument (30-1569) (40-451 [27]).

41. When the accused merely issues a "bad" check signed by himself with his own name, there is no forgery (30-1569) (40-451 [27]), although there may be fraud punishable under (General) Article 96.

42. A false recital of facts in a "flight report" does not constitute forgery, neither is it a lesser included offense (45-339).

43. In a prosecution for forgery and uttering certain checks the checks themselves should be produced in evidence or their absence satisfactorily accounted for. In any event there must be competent proof that the checks alleged have been forged and uttered, otherwise the record will not support a conviction (30-1569) (40-451 [27], Sup. 451 [27]).

44. In a prosecution for the forgery of an instrument specified by name (*e. g.* a post exchange credit slip), the form of which is prescribed by War Department regulations, the court may take judicial notice of the form and contents of the document and it is not necessary to set it out in full in the specification (30-1570) (40-451 [26]).

45. In a prosecution for the forgery of indorsements upon a check it is not necessary that the check and indorsements be set out in full in the specification, but the allegations must be sufficient to apprise the accused of the character of the instrument, and the nature and identity of the offense charged (30-1570) (40-451 [26] (42-21)). The indorsement of a check is a part of the instrument itself, and falsely indorsing the name of the payee of a check on the back thereof, with intent to defraud, is forgery (45-138, 139).

46. A specification charging the uttering of a forged instrument should contain an allegation that the accused knew it to be forged; but if the accused pleads guilty, the conviction may stand (30-1570) (40-454 [97]).

47. While it is necessary to allege an intent to defraud, or prejudice the rights of another, the person so intended to be defrauded, or prejudiced, need not be named (30-1570) (40-451 [28]).

48. When a charge of forgery was erroneously laid under Article 94 (Frauds) and the offense alleged and proved was in violation of

Article 93, it was held that the substantial rights of the accused were not prejudiced thereby (30-1570) (40-394 [2]).

49. In forgery the forged instrument must be of such a nature that "it might operate to the prejudice of another." A forged letter containing nothing which might so operate is not the subject of forgery in its technical criminal sense (30-1570) (40-451 [26]).

50. The actual utterance of a forged instrument, knowing it to be forged, necessarily includes a charge of attempting to pass it, and proof of the completed transaction will support a conviction of the attempt (30-1571).

## V. HOUSEBREAKING AND BURGLARY

(See M.C.M. 180d,e)

51. One who is an accessory before the fact and accepts a part of the stolen property, is guilty as a principal in the commission of housebreaking and larceny (30-1572) (40-451 [49]).

52. Housebreaking is an offense necessarily included in burglary (40-451 [15]) (43-189). Burglary is the breaking and entering of a *dwelling house in the nighttime* with intent to commit a felony therein. This is the common law offense, and instances of it have been rare in courts-martial. Breaking and entering without criminal intent amounts only to a trespass in violation of the general Article 96 (40-451 [14] [15] [33]); and the breaking and entering must be alleged to be wrongful, otherwise no offense whatever will be charged (40-451 [31] [34]). Unlawfully entering a "tent dwelling" is not housebreaking in violation of this Article, but it is a closely related offense punishable under Article 96 which may be substituted without disturbing the sentence (44-148).

52a. Mere knowledge by a person that an unlawful entry and larceny is to be committed by others is not sufficient to make such person an accessory in the crime unless there is evidence that he encouraged, advised, aided or abetted the commission of the offense, or entered into the plan (42-24).

52b. Housebreaking with intent to commit an assault is a lesser included offense of burglary with intent to commit rape (43-189).

52c. An accused was convicted of "housebreaking" and other offenses in violation of this Article. He was found in the company mess hall late at night cooking food, which was Government property, with apparent intention of eating it. There was no evidence of an "unlawful entry" by accused, neither was it shown that there were any restrictions as to the hours when members of the company could be in the mess hall. The conviction of housebreaking was not sustained (43-311).

52d. Riotously breaking into a dwelling and destroying property therein in violation of Article 96 is analogous to housebreaking and punishable accordingly (43-383).

53. In a prosecution for housebreaking and larceny, proof of the unexplained possession by the accused of a part of the stolen property will support a conviction of housebreaking notwithstanding the conviction of larceny is disapproved because of a variance between allegation and proof as to ownership of the stolen property (30-1572) (40-451 [32]).

54. When an entry is charged with intent to commit a specific offense, the intent to commit that offense, or a lesser included one, must be proved (30-1572, 1578) (40-451 [34]) (43-189).

#### VI. LARCENY (See M.C.M. 180g)

(*Note:* Larceny and embezzlement—see sub-head III, this Annotation—are now merged in the offense of “stealing.” The new form of specification prescribed for both larceny and embezzlement (M.C.M. App. 4, Form 92) is very simple, as follows: “In that (name of accused) did, at (place), on or about (date), feloniously steal (description of property), value about \$ . . . , the property of (name of owner).” The offense may be committed by trespass or by conversion through breach of trust.)

55. If a person finds personal property under circumstances which afford a clue to its ownership, and makes no effort to return the property to the owner but appropriates it to his own use, he is guilty of larceny (30-1573); and the intent of the thief to abandon the stolen property after he has used it as long as he desires, is no defense to a charge of larceny (30-1487) (40-451 [40]). Larceny may be committed through the agency of another, the acts of the agent being considered as the acts of the principal (44-148).

56. When several larcenies are committed at different times from different persons the value of the stolen articles cannot be aggregated for the purpose of making it grand larceny (30-1574) (40-451 [47]) (45-463).\*

57. The unexplained possession of stolen property under circumstances indicating that it has been in the accused's possession ever since it was stolen, coupled with evidence showing that the accused had the opportunity to steal it, is sufficient to support a conviction of larceny. But the mere possession of stolen or missing property, when due to the lapse of time, or other circumstances, there is a reasonable inference that the holder acquired possession innocently, is not sufficient to support a conviction of larceny (30-1575) (40-451 [37]) (43-189, 341) (46-214). When it is shown that the accused was

\* But the larceny of several articles in substantially one transaction is a single larceny and should be charged in one specification (49-18).

so drunk at the time of the larceny as to be incapable of forming any specific intent, a conviction cannot stand (40-451 [40]).

57a. Possession of stolen property normally raises a presumption that the possessor stole it; but no such presumption arises when there is no proof that the property had been stolen by any one, and it was not found in accused's actual possession (42-364) (44-151).

57b. When an accused, while being questioned about the larceny of a watch, was seen to make some unnecessary movements in closing a door, following which the watch was found on the ground outside the door about three feet away, and accused was shown to be the only person who had an opportunity to steal it, the circumstances were held sufficient to establish larceny (43-189, 190).

58. When several articles are stolen at the same time and accused is found in possession of a part of the stolen articles, such fact may be considered as tending to show that he stole them all (30-1575).

59. The mere fact that two accused are joint owners of an automobile in which stolen property is found is not sufficient to establish the guilt of one of them in the absence of any other evidence of his possession of the stolen goods (30-1575, Sup. 1575) (40-451 [49]).

59a. No inference of larceny can be drawn from mere suspicion and opportunity to take the property, nor can possession of stolen property be inferred from the mere presence of the accused when the stolen property was recovered from a hiding place revealed by another accused charged with the same larceny. When circumstances are relied on entirely to justify a conviction they must not only be consistent with guilt, but also inconsistent with innocence (43-311) (44-151, 290, 291).

60. A stolen automobile which had been left unlocked was found in the accused's possession a few hours after the car was taken, a few miles distant. The accused was drunk when found. There was no evidence of an intention to desert. The evidence was held not sufficient to support larceny, but sufficient to establish the lesser offense of wrongfully taking and carrying away without the owner's consent in violation of Article 96 (30-Sup. 1573) (40-451 [40]). In larceny the purpose of the accused to deprive the owner permanently of his property must be shown (40-451 [40]) (42-21, 22, 364). In the ordinary case the intent to deprive the owner permanently of his property is present at the time of the taking, but it is also larceny if such intent is formed afterwards (43-12).

61. The fact that the accused absconded at the time of the larceny is a circumstance tending to establish his guilt, but not, alone, sufficient to support a conviction (30-Sup. 1572b) (40-395 [9]).

62. A person who, without authority, breaks open a letter which



has been entrusted to him to mail, and takes money therefrom, is guilty of larceny of the money. It was taken from the constructive possession of the owner (30-1576) (40-451 [38]).

63. The accused was a provost sergeant and handled the distribution of mail in the guard house. He did not receive the mail direct from the post office but got it through an orderly from the headquarters message center. He was convicted of taking a letter "from the United States mail" and stealing two checks therefrom, in violation of Article 96 (General Article). Held that this larceny was not "from the United States mail" and that the penalty of the civil statute for that offense was not applicable, but the punishment should be in accord with that prescribed for larceny under Article 93 (43-239) (44-15) (48-85).

64. The value of the stolen property should be alleged in the specification, but if not, and some value is proved, the failure to allege value is not prejudicial to the substantial rights of accused (30-1577) (40-451 [36] [42]). An article having actual value may be the subject of larceny although it is kept or used by the possessor for illegal purposes (48-137).

65. If there is no allegation as to the date of the offense, but there has been evidence of the date, the court may, in its findings, supply the missing date, provided the accused has not been misled as to the particular offense charged (30-1405) (40-428 [10]). When the alleged date was "on or about the 15th day of the month and the proof showed it to have been the 7th, the variance was held immaterial (40-451 [39]).

66. The ownership of property alleged to have been stolen must be proved as alleged and a variance between the allegation and the court's finding as to ownership is fatal although there is no dispute as to the identity of the property. And so also, if the court, in its finding, excepts the words alleging ownership (30-1579) (40-451 [43] [45]). Community property of husband and wife may be alleged to be owned by the husband (40-451 [33]). But when the stolen property was alleged to belong to the wife and it was proved that the husband was the owner, the variance was held to be fatal (40-451 [41]). And when an accused is brought to trial for property of the husband, the specification cannot be amended to allege larceny of the same property of the wife (43-424).

67. In a specification for the larceny of a check or money order the failure to set out its value is immaterial when the amount for which it was drawn is shown (30-1577) (40-451 [36]).

67a. An accused was convicted of the larceny of a negotiable instrument of the value of \$250. The evidence showed that the instrument taken was a blank check, dated and signed, but not otherwise completed. Accused wrote the word "Cash" in the space provided for

the payee's name, filled in the amount as \$250, indorsed it, and received \$250 for it. Held: Not larceny. When taken the instrument was not negotiable and had no appreciable value. Although a completed negotiable instrument may be the subject of larceny, an incomplete instrument ordinarily is not (45-139). In this case the charge should have been forgery.

68. A specification alleging that accused did "on dates unknown, feloniously take, steal, and carry away at different times, various sums of money, value unknown, the property of soldiers of the Sixth Battalion," is too uncertain to charge any specific offense and will not support a conviction even upon a plea of guilty (30-1578) (40-428 [10]).

69. In larceny it is not necessary to allege the ownership of a money order provided it is fully described, including the names of the remitter and the payee, it being a proper assumption that the payee is the owner. In larceny it is immaterial whether the person from whom the property is taken has a **general or special** ownership thereof (30-1577, 1579) (40-451 [35] [41]) (45-12).

70. A member of an officers' club was convicted of larceny of money belonging to the club. The money was taken from the possession of the custodian of the club's funds and property. The conviction was sustained notwithstanding the accused, as a member of the club, claimed co-ownership, since the taking of the money from the possession of the club custodian, with the felonious intent to deprive the club of the property, was larceny (48-137).

71. A slight variance between allegation and proof as to the value of stolen property is immaterial when not sufficient to change the degree of the offense. But a court cannot, by exceptions and substitutions, increase the value of the stolen property above that alleged, as such action would amount to the conviction of an offense more serious than that charged (30-1578) (40-451 [46]).

72. Where the stolen property (*e. g.* a watch) is in evidence, its inspection by the court properly may be the basis for a finding of some value, but not sufficient to fix a value in excess of the market value as testified to by an expert. In the absence of expert testimony as to the present value of a watch which had been in use twenty-five years and which cost, when new, \$50, a finding by the court that it was worth more than \$20 was held erroneous (30-Sup. 1576a) (40-451 [42]). In the absence of competent testimony as to value, a court may, by inspection of the property, ascertain that it is of some substantial value but not that it has a specific value (43-12, 13) (47-178, 179).

73. For other than articles of government issue and similar articles whose market value is not readily determinable, the value

for consideration in fixing the degree of punishment for larceny is market value at the time of the theft (30-Sup. 1576a) (40-451 [42]) (47-178, 179).

## VII. MANSLAUGHTER

(See M.C.M. 180a)

74. The military authorities should retain jurisdiction, if possible, in the case of a homicide committed, under color of military authority, by a person subject to military law (30-1430) (40-432 [2]). For distinction between voluntary manslaughter and murder see Article 92, Annotation, par. 6c.

74a. The death of a passenger in a military airplane crash caused by the pilot's negligent flying at too low an altitude in violation of orders, renders the pilot liable to trial for manslaughter under this Article (43-271). A homicide caused by the negligent operation of an automobile is manslaughter (43-311). The driver and the person in charge of the automobile may be charged jointly for such a homicide, as the element of intent is not involved (44-63). In order to justify a conviction of involuntary manslaughter by the negligent discharge of a firearm, the negligence must be "culpable"; simple or ordinary negligence (mere carelessness) is not sufficient (44-100). But the conviction of an officer in charge of a demonstration of overhead machine gun firing who failed to take the safety precautions prescribed by regulations for the protection of troops in observation because he regarded them as unnecessary, and by reason of his neglect a soldier was killed, was sustained (44-190, 191). A homicide resulting from an act of simple negligence should be charged, if at all, as conduct of a nature to bring discredit upon the military service in violation of Article 96. Such merely negligent homicide is a lesser offense included in a charge of "unlawfully killing through culpable negligence" in violation of Article 93 (48-138).

74b. In a prosecution for manslaughter it appeared that, following a heated argument, the deceased walked toward the accused "with raised rifle," the accused picked up his own rifle, loaded it and started to retreat, and the deceased shot at the accused, the bullet striking a branch above his head. Accused then shot and killed the deceased. Held, that all the elements of a legal self-defense were present, and that the accused was guiltless of voluntary manslaughter or any other offense (43-428).

74c. An essential element of the prosecution's case in a trial for manslaughter, is proof that the person killed was the person named in the specification (44-191) (46-337, 338). When the charge is the unlawful killing of an unknown person the identity of such person must be established by appropriate description in the specification

of the charge and corresponding proof in the record of the trial in order to inform the accused of the offense with which he is charged and to protect him from another prosecution for the same offense. A specification charging the unlawful killing of "four human beings whose names are undetermined" is not sufficient (48-137).

74d. A homicide committed by "striking X on the head with his fist" is involuntary. Such an assault, though unlawful, does not amount to a felony, nor is it likely to endanger life, and if death results, it is plainly involuntary manslaughter (44-514) (48-81, 82).

74e. When an officer, the leader of a flight of three airplanes, in violation of regulations led his flight, in close formation, in a dive from a high altitude to an altitude only a few feet above the surface of a lake where he could see several small boats with people in them, and one of the planes struck and killed an occupant of one of the boats, his conviction of involuntary manslaughter was sustained. Although it was not proved which plane hit the deceased, under the circumstances the acts of the other two fliers did not constitute independent intervening causes, and accused's act should be regarded as the proximate cause of the death, regardless of which plane struck the deceased (45-12, 13).

74f. Manslaughter and assault with intent to commit manslaughter, committed against two persons by the same act (e.g. a rifle shot which killed one and wounded the other), are distinct offenses and it is not improper to charge both, but the penalty for only one may be imposed. The maximum confinement for either offense is ten years (45-177).

74g. Words denoting "willfulness" or "intention to kill" are essential in a specification or finding of voluntary manslaughter. Without such words the charge is involuntary manslaughter only (47-240, 241).

## VIII. PERJURY

(See M.C.M. 180h)

75. A soldier may be held in the service beyond the expiration of his enlistment for trial by court-martial for perjury committed in connection with applications for allotment of pay and family allowances, or insurance, and also while awaiting the result of Federal investigation with respect to fraudulent use of the mails (30-1580) (40-451 [51]).

76. The materiality of perjured testimony cannot be proved by the bald statement of a conclusion by a witness that it was material (30-1581) (40-395 [23]). The facts and circumstances of the case in which the false testimony was given should be shown, in order that the court may judge of its materiality (30-1584) (40-451 [54]).

[55]). The issues which were involved in the trial in which the alleged false testimony was given cannot be shown by parol evidence unless it appears that no record of the trial is available (30-1581) (40-395 [25]).

77. A properly authenticated copy of a court-martial order is competent evidence of the charges and specifications involved in the case to which the order pertains, and may be accepted for the purpose of establishing the materiality of false testimony given in that trial (30-1581) (40-395 [20]).

78. The record of the trial in which the alleged false testimony was given is admissible to show the accused's testimony and its materiality, but no part of such record is competent to prove its falsity. When such a record was used not only to show accused's allegedly false testimony, but also to show the conflicting testimony of another witness who did not testify in the perjury trial, the proceedings were disapproved (30-1581) (40-395 [20]).

78a. When an accused testifies in his own behalf upon material issues and is acquitted, the acquittal is a complete defense to his subsequent prosecution for perjury in so testifying, unless there is substantial evidence in the perjury trial in addition to, or differing from, that given in the trial in which the accused was acquitted (40-451 [53]). But the conclusiveness of the former judgment does not extend to collateral matters; and when an officer was acquitted of absence without leave on December 24 and of making a false official report of his absence on that day, and was subsequently tried for falsely swearing, at the former trial, that he had signed the company morning report on December 24, and the falsity of such testimony was proved, a conviction of false swearing, in violation of Article 96, was sustained (44-238).

79. Proof merely that the accused has made inconsistent statements under oath is not sufficient to support a conviction of perjury. There must be outside evidence to show the falsity of the testimony alleged to be perjured; and the testimony of only one witness, uncorroborated by other testimony or circumstances, is not sufficient (30-1583; 12-574) (40-451 [53]) (48-32, 33). This rule applies also to the offense of false swearing (see pars. 82 and 82a, *infra*) (48-143).

79a. A witness who, before the end of the trial, corrects his earlier and false testimony, purges himself of the offense and cannot be convicted of perjury (42-22), unless it is obvious that his initial testimony was deliberately and wilfully false and corrupt (U. S. vs. Norris, 300 U. S. 564). (44-12, 13).

80. A specification which alleges that the accused, having taken an oath that he "would swear" that certain written testimony by him subscribed was true, which said testimony was material and false, is

fatally defective because the allegation is, in effect, that the accused would (in the future) swear to testimony already subscribed by him (30-1585) (40-451 [52]).

81. Statutory perjury, as distinguished from the common-law offense, is chargeable under (General) Article 96 and not Article 93 (30-Sup. 1582) (40-451 [52]). Statutory perjury (see U. S. C. title 18, sec. 231) is the giving of false testimony under oath "before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered." False testimony given under oath before a board of officers appointed to investigate the death of a soldier, a retiring board, a board appointed under Article 105 (Injuries to Property—Redress of) or any board authorized to examine witnesses under oath, is statutory perjury (30-1582, Sup. 1582) (40-451 [52]). Solicitation to commit perjury is an offense in violation of Article 96 although the perjury may not have been actually committed (47-298).

82. False swearing, which is a lesser included offense in perjury and statutory perjury, consists of giving false testimony under oath before an investigating officer, or board, not authorized by law to examine witnesses under oath, or the giving of false testimony not material to the issues in a judicial proceeding. It is punishable under (General) Article 96 (12-147; 30-Sup. 1582) (40-451 [52]).

82a. A charge of false swearing must be supported by proof of the falsity of the statement made and this proof is not made by showing mere contradictory statements made by accused. The making of contradictory statements may be, in itself, a military offense, but it is not false swearing, and is not included in false swearing (42-216) (48-143) (49-75).

83. False testimony before an illegally constituted court is not perjury (30-1358). In a trial for perjury alleged to have been committed before a court-martial, sufficient evidential facts must be adduced to show that such court-martial was legally constituted and organized and had jurisdiction to try the case in which the alleged false testimony was given. Such facts, as to a court-martial, may not be supplied by judicial notice (47-179, 180).

## IX. ROBBERY

(See M.C.M. 180f)

84. The offense of robbery includes all acts of violence involved in the robbery and the accused should not be charged with an assault in addition to the robbery when there was a continuity of offenses making the several acts only one crime (30-Sup. 1585a) (40-428 [5]). Assault with intent to do bodily harm is a distinct offense, not included in robbery (30-1450) (40-451 [59]). So, under a charge of

robbery, the accused may be convicted of a simple assault, which is an included offense, but he may not be convicted of assault with intent to do bodily harm. Wrongful taking is a lesser included offense in robbery (40-Sup. 441 [59]).

85. One who accompanies others on an expedition the object of which, as known and assented to by him, is the robbing of pedestrians, who without protest or active participation, stands by during several "hold-ups" and shares in the proceeds, is guilty of robbery (40-451 [62]) (44-284, 285).

86. In robbery, as in larceny, the ownership of the property taken should be alleged, but failure to do so will not necessarily affect the validity of the proceedings (30-1588) (40-451 [56]).

87. A statement by the accused to the party robbed, at the time of the robbery, that he would leave the property (an automobile) at a certain place, is not conclusive evidence that there was no intent to deprive the owner permanently of his property, and the question of intent being one of fact, a conviction of robbery in such case may stand (30-1586) (40-451 [57]). An offer to return the stolen property upon payment of money in the nature of ransom, is tantamount to an intention permanently to deprive the owner of his property (46-65).

88. Proof that the property was taken from the immediate presence of the victim is sufficient to support an allegation that it was taken from his person (40-451 [58]) (44-191, 192). Larceny from the person (*e.g.* pocket-picking) is a lesser included offense in robbery (40-451 [59]); but receiving stolen goods is not (40-451 [60]).

89. When an accused was charged with robbery "by force and violence and by putting him in fear" and the court found him guilty except for the words "by force and violence, and", it was held sufficient because robbery may be committed either by force and violence or by putting in fear (40-451 [61]):

89a. Two robberies of separate persons at one time and by use of the same act of force, although they may be specified separately in the charges, should be treated as a single offense for the purpose of fixing the penalty (43-187).

## X. SODOMY

(See M.C.M. 180j)

90. The specification need not allege in detail the acts which constituted the offense. It is sufficient if the accused is apprised of the offense intended to be charged (30-1591) (40-451 [63]); but when the particular manner in which the crime was committed is alleged, a material variance in the proof will be fatal to the pro-

ceedings (30-1592) (40-451 [64]). The offense is not limited to any particular type of sexual connection (45-339).

91. Direct proof of penetration is not essential, it may be inferred from the facts shown. The offense, including penetration, requires strict proof, but circumstantial evidence may be sufficient (30-1590) (40-451 [64]). But when circumstances are relied upon entirely, they must not only be consistent with guilt but also inconsistent with innocence (43-143).

92. One who is present and aids in the commission of sodomy, though he does not personally commit the offense, is guilty as a principal (30-1590) (40-451 [64]).

93. An uncontrollable desire for the particular form of unnatural intercourse charged is not a legal defense (30-1590) (40-451 [64]) (43-341). But, more recently, this rule was modified to conform to the rule prescribing the test for mental responsibility in *M.C.M. 110b* (page 121) as follows: "A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, both to distinguish right from wrong and to adhere to the right" (43-383). Under this rule it was held that a sodomist who "was decidedly homosexual and could not control the impulse for unnatural sexual relations," but "could however desist from the act when in fear of detection," was mentally responsible, and his conviction was sustained (43-384). Evidence of prior acts with the same party is admissible to show the inclination of the parties for each other, but evidence is not admissible of sodomy committed with persons other than the one involved in the case on trial (44-13).

93a. Attempt to commit sodomy is a lesser included offense in a charge of sodomy (40-Sup. 451 [64]).

94. When the specification charges the commission of the offense with a certain named person, and the court, by exceptions and substitutions, finds the accused guilty of sodomy "with an unidentified man" or a person different than the one specified, the variance is fatal (30-1592) (40-451 [65]). But when the identity of the participant is not known, a specification charging the offense with a person unknown will be sufficient 40-451 [63]).

• • • •

*ARTICLE 94. FRAUDS AGAINST THE GOVERNMENT. Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or*

*Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim*



against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

*Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or*

*Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or*

*Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or*

*Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or*

*Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or*

*Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or*

*Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipment, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof: Provided, That any person, subject to military law, who commits larceny or embezzlement with respect to property of the United States, furnished or intended for the military service thereof, or with respect to other property within the purview of this article, steals said property within the meaning of this article; or*

*Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other prop-*

erty of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same; or

Who enters into any agreement or conspires to commit any of the offenses aforesaid;

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. If any person, being guilty of any of the offenses aforesaid or who steals or fails properly to account for any money or other property held in trust by him for enlisted persons or as its official custodian while in the military service of the United States, receives his discharge or is dismissed or otherwise separated from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so separated therefrom. (As amended by S.S.A. '48, effective Feb. 1, 1949.) (See M.C.M. 181.)

# ANNOTATION

|   | Pars. |
|---|-------|
| I. FALSE CLAIMS .....                                       | 1-4   |
| II. STEALING — MISAPPROPRIATION — MISAPPLI-<br>CATION ..... | 5-27  |
| III. OTHER FRAUDS AGAINST THE GOVERNMENT                    | 28-32 |
| IV. LIABILITY AFTER SEPARATION FROM SERVICE                 | 33-38 |

## I. FALSE CLAIMS (See M.C.M. 181a, b)

1. Making a false claim against the Government, in violation of the first clause of this Article, is a distinct act from the presentation of such claim in violation of the second clause. Also the fourth clause of the Article may be violated when the claim itself is valid but the paper by which it is presented contains a false statement (*e.g.* an officer's pay voucher which falsely represented a certain person as his wife, although he was entitled to the amount claimed on other grounds of dependency). The gist of the offense under the fourth clause is not that the *claim* is false, but that the *statements* are false (45-424, 425). In such case, when the accused is charged with presenting a false claim, and the specification charges the making of a false statement in connection therewith, a conviction of "wrongfully making a false statement" in violation of Article 94 may be sustained (46-65).\*

2. An officer who, by collusion with a contractor, certifies to the receipt of goods not received, is guilty of a violation of this Article (12-138). Payment by a disbursing officer of an unfounded claim (*e.g.* "flying pay" based upon claimant's certificate as to flying known

\* But not so if the specification alleges only the *presenting* of a false claim without any allegation as to false *statements* (49-72).

by the disbursing officer to be untrue) would subject the disbursing officer to prosecution under this Article (40-1676).

3. Duplication of pay vouchers is a violation of this Article (12-138), and the fact that the accused had an agreement that the first voucher was not to be presented, but merely held until the accused could substitute other security, is no defense (12-503).

4. If an officer claims allowances, as for a married man under the belief that he is legally married, he is not guilty of making a false claim even though his marriage was in fact illegal and void (30-1531) (40-452 [7]).

## II. STEALING—MISAPPROPRIATION—MISAPPLICATION

(See M.C.M. 181h)

5. Under this Article, as amended, as in Article 93, larceny and embezzlement are merged into the crime of stealing. Failure or refusal to turn over public funds when ordered to do so by competent authority, is *prima facie* embezzlement, and the burden is upon the accused to justify his action and not upon the prosecution to show what has become of the funds (12-138, 139; 30-1528) (40-452 [3]).

6. When an accused was charged with embezzling money from the Post Signal Fund under Article 93, and another sum of money from the United States under Article 94, and by reason of his commingling of the funds the amount embezzled from each could not be definitely determined, a conviction of embezzlement of unknown sums in violation of Articles 93 and 94, respectively, not exceeding the amounts stated in the specifications, was sustained (43-383). Physical possession of the property in question by the embezzler is not an essential element of embezzlement. He may have custody only (45-280, 281). Stealing of property of the Army and Air Force Exchange Service may be charged either under Article 93 or Article 94 (47-296).

7. Embezzlement of funds furnished or intended for the military service is chargeable under this Article and its application thereto is not affected by the enactment of subsequent civil statutes. Embezzlement of other public funds is chargeable under Article 93 (Various Crimes) (12-140, 144; 30-1529) (40-451 [16]).

8. A company commander who, without authority, sells supplies issued and intended for the military service either to himself or another, is guilty of embezzlement (30-1528) (40-452 [3]).

9. Under a charge of wrongfully selling Government military property in violation of this Article there must be direct evidence of the character and ownership of the property as alleged, or evidence from which a reasonable inference of such character and ownership can be drawn (46-339).

10. Money delivered to a company commander with which to pay the members of his company remains the property of the United States until paid to the men; and if a company commander does not pay the money over to his men when due, and he has not been constituted by them as their agent for the purpose of its collection or custody, it constitutes a *prima facie* case of embezzlement in violation of this Article (30-1528) (40-452 [3]).

11. Motion picture coupon books are not property "furnished and intended for the military service" within the meaning of this Article. Their embezzlement is punishable under Article 93 (30-Sup. 1533) (40-452 [8]).

12. The making of a false claim against the Government in violation of Article 94 is not a minor offense punishable under Article 104, and purported disciplinary punishment under the later Article does not bar trial by court-martial for the same offense (44-192).

13. The value of an article of Government property issued for use in the military service is that given in the price list published by the War Department of which the court will take judicial notice (30-Sup. 1533). But when a soldier was charged with embezzling a pistol, value \$14.65, and the court, by exceptions and substitutions, found him guilty of embezzling a pistol, value \$22.60, which was the correct figure, it was held that since the maximum punishment for embezzlement of property worth \$22.60 exceeds that for embezzlement of property worth \$14.65, the court was not justified in making the change, and that the record would support a conviction of embezzlement of property of the value specified only (30-1530) (40-452 [5]). When the property in question is salvage and reclaimed items no longer in serviceable condition, the rule that the Government price list governs cannot be followed (47-297).

14. Larceny of property of the United States furnished or intended for the military service is a violation of this Article (12-139). The proof must be as complete as in ordinary cases of larceny. Evidence merely that an article of military property (pistol) which had been issued to the accused, was missing after he deserted, is not proof that he stole it (40-452 [9]).

15. In order to support a conviction of larceny under this Article there must be evidence sufficient to justify at least an inference that the stolen article was the property of the United States furnished or intended for the military service (30-Sup. 1533) (40-452 [13]) (48-34, 35). Such inference may, in some cases, be drawn from the circumstances, as when the stolen property consisted of cigars, candy, and sugar, and Government ownership of the sugar and candy was definitely established, and it was shown that the cigars were taken, with the candy and sugar, from a Government store house, the

court was held justified in finding that the cigars also belonged to the Government (30-1533) (40-452 [13]).

16. When an accused was convicted of the larceny of government military shirts and underwear, and goods similar to those specified were found in his possession, but there was no proof that any shirts and underwear had been lost by the government, and no other proof that any larceny had been committed, the evidence was held insufficient to support a conviction (30-1533) (40-452 [12]) (44-290, 291) (47-181).

17. In a prosecution for larceny of "groceries" under this Article, proof that the accused was a cook and had access to the place where such supplies were kept, and that ordinary commercial articles similar to those missing were found in a house where the accused lived, but not occupied exclusively by him, was held not sufficient to establish guilt. In another case when articles, similar to those alleged to have been stolen, were found in the accused's possession more than a year after the supposed theft, and there was no proof that the accused ever had access to the missing property, and the date and amount of the government's loss were indefinite and uncertain, it was held not sufficient to support a conviction (30-Sup. 1533) (40-452 [10], 395 [9]).

18. Under a specification charging the larceny of "beef, butter, and pork," a finding of guilty of larceny of "subsistence supplies" was held to be an improper substitution, being a separate and distinct offense from that charged (30-Sup. 1534) (40-452 [15]). Under a specification charging the larceny of a "Thompson submachine gun SN 32705" a finding of guilty of the larceny of a "Thompson submachine gun," omitting the number, was held to be improper (45-180).

19. To constitute "carrying away," it is not necessary that the property be completely removed from the place where it was kept. When the evidence showed that the accused started to remove it with larcenous intent, but, upon discovery, dropped it and fled, it was held sufficient (30-1533) (40-452 [11]).

20. Where larceny of private property is charged under Article 93 (Various Crimes), the court cannot substitute larceny of government property in violation of Article 94 because the latter offense contains vital elements not included in the former (30-1533) (40-451 [43]). Government ownership of the stolen property is essential to constitute larceny under Article 94, and if the court, in its findings, excepts the words alleging such ownership, and still finds the accused guilty of a violation of this Article, the conviction is illegal and of no effect (30-1534) (40-452 [13]).

21. The larceny of Government property may be charged under Article 93, but if so charged neither the court nor the reviewing

authority can substitute a violation of Article 94, because the larceny of property of the United States, furnished and intended for the military service, is an offense containing elements which are not included in the offense of simple larceny punishable under Article 93, and the offense thus substituted could not be a lesser offense included in the one charged (30-1534) (40-451 [43]).

22. To "misappropriate" means to devote to an unauthorized purpose. The word is used in Article 94 to cover acts not included in larceny or embezzlement, consequently the offenses of larceny or embezzlement are not included in a charge of misappropriation (30-Sup. 1535); but misappropriation may be a lesser included offense in a charge of larceny (30-1535) (40-452 [18]). The term "misapplication" applies when the property is wrongfully used for the accused's own benefit. Both misappropriation and misapplication may include instances where the property involved was not entrusted to the accused's control or supervision. A person who makes wrongful and unauthorized use of Government property may be guilty of the misappropriation or misapplication of such property in violation of this Article, whether he obtained control of it rightfully or wrongfully (44-236, 237). And one who makes unauthorized use of a Government vehicle for his sole benefit has effected a conversion rendering him liable even for loss or damage which due care could not have prevented (44-472). But the conviction of a soldier of misappropriation of a Government truck which he drove upon an authorized trip after he had been relieved from duty as a "stand-by" driver, in which the vehicle was damaged, was disapproved (48-83, 84).

23. When vehicles alleged to have been misappropriated are specifically described in the specification, those proven to have been misapplied must be identical with those described (47-12). Using a Government military car for personal purposes in direct violation of orders is a violation of this Article (43-271, 272).

24. A misappropriation under this Article need not be to the personal benefit of the accused. The unauthorized use of public property for the benefit of persons not belonging to the military service is chargeable as a misappropriation of government property by the military person responsible for such misuse, even though such action was sanctioned by higher authority, or had been customary at the particular post (12-138) (44-236, 237).

25. The misappropriation of private property is not a lesser offense included in a charge of misappropriation of government property under Article 94 (30-1448) (40-452 [23]).

26. The specification must contain some allegation, express or implied, that the misappropriation was committed with guilty

knowledge or intent (30-1535) (40-452 [17]). An officer who was custodian of an officers' club sold a typewriter assuming that it was club property. It was in fact Government property. A conviction of "wrongfully, and without proper authority, selling a typewriter, property of the U. S. furnished and intended for the military service" was sustained. It was shown that the accused was not authorized to sell club property, consequently his act was wrongful whether it was club property or property of the U. S. (46-338, 339).

27. A quartermaster sales officer failed to report four sales slips which were produced by customers. He had substituted checks received in payment of the sales for cash taken from the daily sales of the commissary. Thus the cash which was extracted from the prescribed channels came under the accused's control. The accused remained silent. His conviction was sustained. When a *prima facie* case is made out, the burden is on the accused to rebut it if he would avoid the consequences (44-421, 422).

### III. OTHER FRAUDS AGAINST THE GOVERNMENT

(See M.C.M. 181)

28. The following are instances of violation of this Article: Willfully inducing another to make a fraudulent lease of premises to the United States for public purposes; forgery of a discharge certificate and final statement; and falsifying entries in the company clothing accounts (12-139).

29. Larceny, and wrongful sale, of the same Government property are distinct offenses in violation of Article 94 and may be so charged (44-13). Also larceny of Government property in violation of Article 94, and attempted sale of the same property in violation of Article 96 are separate offenses and may be so charged (44-288).

30. A specification alleging merely that accused made a false oath or certificate to a document, without any averment that it was done for the purpose of making, or causing to be made, a false claim against the government, does not charge a violation of this Article (30-1532) (40-452 [6]).

31. Under a charge of wrongfully selling Government property in violation of this Article, the accused cannot be convicted of wrongfully pledging it, the latter being a separate and distinct offense from that charged (30-1535) (40-452 [21]). Wrongful sale does not include permitting others to sell (48-189, 190).

32. The offense of unlawful purchase of Government property (e.g. buying a Government pistol from a soldier) is distinct from that of unlawful receiving in pledge, and the latter is not included in the former (42-22).

## IV. LIABILITY AFTER SEPARATION FROM THE SERVICE

(See M.C.M. 181k)

33. A soldier was tried and convicted of a violation of Article 93 committed in a former enlistment. The offense could have been laid under Article 94. It is a general rule that, except for offenses specified in the concluding clause of Article 94, court-martial jurisdiction ceases on discharge from the service, and that jurisdiction as to offenses committed during an enlistment from which the soldier has been discharged is not revived by his reentry into the service. On the question whether it would be proper to treat the instant case as a violation of Article 94, thus retaining the jurisdiction, it was held that such action would be prejudicial to the rights of the accused, and the conviction was disapproved (47-295, 296) (M.C.M. 78b).

34. In *habeas corpus* proceedings brought by a discharged soldier charged with certain violations of this Article while in the service, the accused contended that before he could be held for trial by court-martial the facts must be proved, but the U. S. District Court held that "on a review of this sort, the function of the civil court is purely to determine whether the court-martial has jurisdiction," and the writ was dismissed (45-443).

35. A soldier is liable to trial by court-martial for a violation of this Article after his dishonorable discharge and while serving a sentence to confinement for another offense, provided the statute of limitations has not run (12-139, 172). A discharged soldier brought to trial under this Article and acquitted is not entitled to pay for the period spent in confinement awaiting trial and final action (12-140).

36. An enlisted man who, while acting as company clerk, falsified certain pay cards and final statements which resulted in a duplication of his own pay, was held amenable to trial by court-martial for such offense after his discharge from the service (30-1327) (40-452 [1]).

37. A former soldier tried and convicted of a violation of this article and sentenced to confinement in the U. S. Disciplinary Barracks, should be treated as a "garrison prisoner" rather than as a "general prisoner" (30-1615) (40-p. 984).

38. Clothing issued to a soldier and charged to his clothing account continues the property of the United States so long as the soldier remains in the service. Upon his discharge, such clothing as he is allowed to retain becomes his personal property (30-1873) (40-1479).



**ARTICLE 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.**  
*Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.* (See M.C.M. 182. See also A.W. 44 which, in time of war, authorizes reduction to ranks).

### ANNOTATION

|   | Pars.  |
|---|--------|
| I. IN GENERAL .....                       | 1-6h   |
| II. RELATIONS WITH OFFICERS AND MEN ....  | 7-10a  |
| III. CHEATING .....                       | 11-12  |
| IV. DRUNKENNESS AND DISORDERLY CONDUCT .. | 13-15a |
| V. FINANCIAL AFFAIRS .....                | 16-24a |
| VI. FALSE OFFICIAL REPORTS OR STATEMENTS  | 25-29b |
| VII. DOMESTIC RELATIONS .....             | 30-33  |

#### I. IN GENERAL

(See M.C.M. 182)

1. The mandatory sentence of dismissal indicates that this Article is intended to be applied only in cases where the conduct has been disgraceful and manifestly unfitting both an officer and a gentleman and such as to exhibit him as unworthy to hold a commission in the army. Slightly disreputable acts should not be charged under this Article (12-140).

2. It is not necessary that the conduct be connected with, or directly affect, the military service. It is enough that it is morally wrong and of a nature to dishonor or disgrace the offender, or compromise his character as an officer (12-140). Breach of trust, official, semi-official, or personal, is conduct unbecoming an officer and a gentleman (43-13).

2a. Article 95 includes acts punishable by any other Article if they amount to conduct unbecoming an officer and a gentleman; and it is not legally objectionable to charge identical acts as violations of both Article 95 and some other applicable Article. Thus an officer who embezzles military property violates both Articles 95 and 94 (44-344, 345). See also paragraph 13c this Annotation.

3. The purpose of charges under this Article is to obtain the judgment of a court-martial as to whether the accused should be dismissed from the service. No other, or additional, punishment is authorized under this Article. If other offenses are involved, they should be charged under their appropriate Articles in order that such additional punishment may be awarded as may be warranted (12-489, 562).

3a. Dismissal is the only punishment authorized for a violation of this Article. The court may not, by exception and substitution

of another Article, increase the punishment for the offense originally charged (42-215). But see Art. 44 as to reduction to ranks in time of war.

4. A finding of guilty of "conduct to the prejudice" etc., under Article 96 is sanctioned under a charge of "conduct unbecoming" etc., under Article 95, but such procedure should not be resorted to for the purpose of relieving the accused of his due share of culpability (12-557).

5. A sentence dismissing a temporary officer who is a retired enlisted man of the regular army does not deprive him of his retired status (30-318).

6. The following have been held to constitute violations of Article 95: Preferring false charges against another; attempting to induce another to join in a fraud on the government; corruptly attempting to influence the vote of an officer in a matter before the post exchange council; misappropriating subsistence supplies; violation of a pledge to abstain from the use of intoxicants; drunkenness and disorderly conduct in uniform in a public place; fighting, while drunk, with another officer in the presence of other officers and soldiers; gambling with enlisted men, or visiting a disreputable gaming house and gambling with gamblers (12-141); "hit-and-run" driving (40-453 [20]). Using marked cards, by an officer, in a game of poker for stakes, with intent to defraud his fellow players, is a flagrant violation of this Article (44-140). Larceny, although ordinarily charged under Article 93, may be charged under Article 95; but if charged under this Article alone, dismissal is the only penalty that can be adjudged (44-381, 382); and the court may not, by the substitution of Article 93, increase the penalty. See paragraph 3a, this Annotation. An officer who, without authority, changes his own efficiency record from "satisfactory" to "superior," and adds thereto an authorization for a decoration, is guilty of deceitful conduct in violation of this Article (45-89).

6a. Soliciting of funds by an officer from civilians in return for securing employment for them in the War Department is a violation of this Article (42-365). The "sale" of military privileges, such as a furlough, to an enlisted man by an officer is a violation of both Articles 95 and 96 (43-239).

6b. Any disorderly or violent conduct of a disreputable character in public by an officer is a violation of this Article (43-13). In military law a house of prostitution is a public place (44-288). A "public place" is a place frequented by the public, or some of the public, or a place open to public view. It need not be a place available to the whole public, as an inn, a common carrier, or a public way or park. Thus a cafe is a public place, also an armory, a dispensary, a

porch visible from a public road, a hotel room, or the bar of an officer's club (46-339).

6c. Indecent remarks by an officer referring to the wife of another officer who is not present, is conduct in violation of this Article (43-14).

6d. Appearing in public in improper uniform, wearing unauthorized insignia, wrongfully representing himself to have an official status which he does not have, and the preparation and presentation of a purported official letter, is conduct in violation of this Article (43-312, 313). The wearing of unauthorized insignia, service ribbons or decorations, by an officer, with intent to deceive, for personal gain or advantage not necessarily pecuniary, or for personal aggrandizement, social or otherwise, is a violation of this Article (44-100, 422).

6e. Soliciting and accepting a large sum of money by an officer from a Government contractor with whom he has official relations, under circumstances indicating that the money would not have been advanced if the officer had not been in an official position to benefit the contractor (in other words "a bribe") is dishonorable conduct in violation of this Article (43-343). Soliciting and accepting money by an officer from civilians with whom he has official relations, under color of loans which are not repaid, is a violation of this Article (45-54, 55).

6f. Occupying a hotel room, by an officer, without registering, with intent to defraud, is a violation of this Article (44-63).

6g. An officer was convicted of being "drunk and asleep in uniform while on duty" in violation of Article 95. It was not proved that he was drunk. The language remaining in the specification if the words "drunk and" are excepted, does not charge an offense without adding an allegation that such conduct was "wrongful," "unlawful," or the like. Conviction disapproved. (44-380, 381).

6h. The disclosure by an officer who had the duty of censoring soldiers' mail, of the contents and authorship of such mail, to other soldiers of the same organization, is a flagrant violation of the writers' right to privacy, and a breach of trust constituting a violation of this Article (45-281).

## II. RELATIONS WITH OFFICERS AND MEN

7. Abusive language towards a superior officer may be an offense under this Article, but it must be a more serious offense than the disrespect which is the subject of Article 63 (12-488).

8. Striking a soldier as a punishment for a dereliction of duty is an offense against military law punishable under this, or the 96th (General) Article according to the seriousness of the case (30-1490) (40-453 [3]).

9. Borrowing money from an enlisted man, while it may constitute a violation of Article 96, is not regarded as a violation of the 95th Article unless some moral delinquency on the part of the officer concerned is involved (30-1491) (40-353 [5]) (43-313). Also see paragraph 6a, this Annotation, as to sale of privileges to enlisted men, and Article 96, Annotation, par. 4a.

10. Drinking intoxicating liquor in the presence of enlisted men in a public place may constitute, for an officer, a violation of Article 95; but to drink liquor with an enlisted man is, *per se*, no more disgraceful than to drink with another officer, and, if done in private, and no disorderly conduct is involved, the offense, if there be any, constitutes a violation of Article 96, and not of Article 95 (30-1464) (40-453 [9]) (43-342).

10a. Selling intoxicating liquor by an officer to enlisted men in violation of orders and at exorbitant prices, is a flagrant violation of this Article (45-234). But a single isolated sale of one bottle of whiskey by an officer to a soldier, at the soldier's request, is not an offense of such serious character to warrant a conviction under Article 95 (46-123).

### III. CHEATING

11. When an accused student officer at a service school was charged with submitting, as his own work, matter copied from the paper of another officer, and the evidence showed merely that, during an examination, the accused looked in the direction of the other officer several times, and that their respective papers bore no similarity, it was held that the evidence not only failed to sustain the charge but actually disproved it (30-1492) (40-453 [7]).

12. The fact that an officer is a volunteer student in a course of instruction in which he is detected in cheating, is no bar to his prosecution under this Article (30-1492) (40-453 [6]).

### IV. DRUNKENNESS AND DISORDERLY CONDUCT

13. Drunkenness, without any allegation or proof of disorderly conduct, may constitute a violation of this Article; but drunkenness in the privacy of one's own quarters, without publicity or disorder, or slight intoxication without any disorderly conduct, are violations of (General) Article 96 rather than Article 95 (30-1493, Sup. 1463 a, 1493) (40-453 [12]) (43-238). When there is no evidence that accused's conduct was of the reprehensible character violative of Article 95, the record will be sufficient to support a conviction under Article 96 only (40-453 [8] [10] [11]) (43-64, 99).

13a. In the case of an officer who was convicted of being so drunk and disorderly, in the presence and hearing of several persons, as to disgrace the military service, in violation of Article 95, the evidence

showed that accused was drunk and used vile language to strangers in a hotel dining room in South America, and that he reported for duty in South America, in the presence of several persons, in an intoxicated condition. The conviction was sustained with the statement that the offense was aggravated by having been committed in a foreign country, and that being drunk under the circumstances stated constituted conduct unbecoming an officer and a gentleman (42-164). (See also 42-327).

13b. An officer entered the camp where he was stationed at night while drunk, used foul and abusive language to the sentinel who challenged him, threatened to attack the sentry with a knife and had to be overpowered and disarmed by four soldiers. Held, his drunkenness was so gross and his misconduct so conspicuous and disgraceful as clearly to warrant a conviction under this Article (43-63).

13c. Trial under identical specifications for being drunk and disorderly in a public place, one laid under Article 95 and one under Article 96 does not constitute double jeopardy, and conviction of both was not illegal, but should be considered as a single offense in fixing punishment. In the same case the accused also was charged with assault with intent to do bodily harm in two identical specifications, one under Article 93 and one under Article 95. He was convicted under Article 93 and acquitted under Article 95. Held, no inconsistency between the findings because proof of facts which would support the charge under Article 93 would not necessarily warrant conviction under Article 95 (43-96).

13d. Intoxication induced by a combination of whiskey and a drug, the latter prescribed by a doctor as medicine, when the evidence is conflicting as to the relative effects of the liquor and the medicine, cannot be considered as a condition of "drunkenness" there being no positive proof that the resulting incapacity was due solely to the alcohol (43-343).

14. Under a charge of being drunk "in uniform" the fact that the accused was in uniform may be inferred from his recognition as an officer by enlisted men who did not know him personally (30-1493) (40-453 [11]).

15. An allegation that the accused "being in uniform did at R. on or about the 28th day of September, 1918, to the scandal and disgrace of the military service, conduct himself in so disorderly a manner as to cause his arrest by the civil authorities, his transportation through the public streets in a police patrol wagon, and his detention for some hours in a city police station," although objectionable as to form, is sufficient to charge an offense under this Article (30-1493).

15a. When an officer who had been making a disturbance at a club resisted arrest by the military police, used vile language toward

them, struck one of them, and broke the window of a cell in the city jail where he was placed, his conviction under Article 95 was sustained (43-385).

## V. FINANCIAL AFFAIRS

16. The mere failure or neglect to pay private debts, unless accompanied by dishonorable conduct such as false representations, fraud, deceit, or evasion, does not ordinarily constitute a violation of this Article (12-141, 142, 878; 30-413, 1494) (40-453 [13] [14] [15]) (44-382); but continued indifference to pecuniary obligations, causing repeated complaints of creditors, and bringing scandal upon the military service, constitutes an offense hereunder (12-141, 142) (42-22, 106) (44-7).

16a. Denial in good faith of liability for income taxes, and defense of a suit brought by the Government to collect them, does not warrant disciplinary action under the Articles of War (43-17). But when an officer was convicted under Article 95 of dishonorable neglect to pay certain promissory notes and failure to keep his promise to pay another, and the evidence showed that, although financially unable to pay all his debts, his income in the Army being smaller than it had been in civil life, he could have made substantial partial payments, it was held that his failure to meet his obligations to the extent his income permitted was dishonorable, and the conviction was sustained (43-64).

17. If an officer fails to appeal from a civil judgment against him the indebtedness is considered as established and the merits of the case will not be enquired into by the military authorities. It is the officer's duty to take such steps as lie within his power to satisfy the judgment (30-Sup. 415 a) (40-453 [13]).

18. The cancellation of debts by bankruptcy proceedings does not release an officer from the moral obligation imposed upon him by the military code of honor to pay his just debts; and the resort to bankruptcy for the specific purpose of avoiding a judgment entered by a court of competent jurisdiction may be regarded as a violation of the military code (30-414) (40-453 [13]).

19. Embezzlement, giving a worthless check, lending money to enlisted men at usurious rates of interest, and duplication of pay vouchers, are violations of Article 95 (12-142, 143, 541). Prompt cash redemption of a dishonored check tends to refute the inference of an "intent to defraud" (44-289, 290). The unauthorized borrowing by an officer for his personal use from a post exchange fund of which he is custodian is a violation of this Article (44-344).

20. Under a charge of issuing a bad check, the fact of insufficient funds must be established by competent evidence. The usual certificate of protest is not admissible for this purpose (30-1475, 1497) (40-395 [16]), 453 [21] [24], 454 [66]). The intentional giving of a

worthless check by an officer for a gambling debt, or as a gift, would be discreditable, and in many cases a violation of Article 95 (40-453 [24]) (44-290). In a prosecution for issuing a worthless check, the protested check, standing alone, is not sufficient to support a conviction, but when the accused has admitted the offense, the protested check is sufficient corroborative evidence to render the confession admissible. Neither the protested check nor the confession, alone, would be sufficient, but both together will support a conviction (44-423).

20a. A conviction of issuing a worthless check with intent to defraud in violation of this Article was set aside in a case where it appeared that the overdraft was caused by a change in the status of accused's bank account of which he had not been advised by the bank. An accused is chargeable with knowledge of the status of his bank account only so far as results from his own acts, such as making deposits or drawing checks, or other changes of which he has been notified (43-384, 385). But when certain checks of an officer were dishonored because he went absent without leave and his pay, which would have been deposited to his credit in the bank was not so deposited, his conviction under this Article was approved (44-14).\*

20b. Neither the fact that a check bears the notation "protested for non-payment," nor that it was not paid, nor both together, constitute sufficient evidence that the check was worthless when issued (44-101, 150, 151).

21. Obtaining money from a bank by falsely representing to the bank that funds would be deposited at a certain time constitutes a violation of this Article (30-1497) (40-453 [25]).

22. When an accused was charged with obtaining \$50 in cash from the post exchange for a worthless check, and the evidence showed that he obtained nothing but credit, it was held that the offense charged and the one proved were different in nature and legal effect, and the proceedings were disapproved (30-1497) (40-454 [53]). In drawing specifications for making worthless checks, care should be taken that there is no material variance between allegations and proof.

23. An exchange officer cashed his own bad check out of exchange funds. He was convicted of (1) obtaining money from the exchange under false pretenses by means of a worthless check, and (2) with embezzlement of the funds. It was held that he could not be said to have obtained the money under false pretenses because he could not deceive himself, but that the evidence was sufficient to support a conviction of embezzlement (30-1497) (40-453 [25]).

24. An accused was charged with "dishonorably and wrongfully"

\* In "bad check" cases (See M.C.M. App. 4, Form 110) where the evidence shows mere carelessness in maintaining a sufficient bank balance, the following is suggested as a proper form of finding to cover the lesser included offense in violation of A.W. 96: *That accused uttered said check without having, and without intending to assure that he should have, sufficient funds in the drawee bank for payment thereof, in violation of A.W. 96.* (49-76)

failing to maintain a sufficient bank balance to meet a check issued by him, in violation of Article 95, and the court, by exceptions and substitutions, convicted him of "wrongfully" failing, etc., in violation of Article 96. The conviction was held proper, because the elimination of the word "dishonorably," indicated a finding of guilty of "conduct of a nature to bring discredit," etc., rather than conduct "unbecoming an officer and a gentleman" (30-Sup. 1497) (40-453 [22]).

24a. The wrongful drawing of a worthless check is not a lesser offense included in a charge of depositing such check (40-453 [24]).

## VI. FALSE OFFICIAL REPORTS OR STATEMENTS

25. The making of a false official statement, report, or certificate, of a material character, verbal or written, is always a violation of this Article (12-141). But the absence of "an intent to deceive" reduces the offense to a violation of Article 96 (43-192).

25a. The court may take judicial notice that a report handed to an assistant adjutant intended for the commanding officer is a report to the commanding officer (42-215).

25b. Ordering an enlisted man to make a false statement or report is a violation of this Article (43-13, 14, 342).

25c. As in perjury, the correction of a false statement before the interview during which it is made is completed, "purges" the falsity and precludes prosecution for it (43-143). But when the initial statement was obviously made deliberately, with intent to deceive, and the accused breaks down under cross-examination and admits the truth, this does not purge the offense (43-190) (44-12, 13).

25d. A battery commander coerced men of his command who committed minor infractions into signing false "statements of charges" which resulted in deductions from their pay, which statements he certified as correct. The soldiers had the choice of signing the false statements or being court-martialed. He admitted the facts but claimed that it was the best method of maintaining discipline, instead of using "company punishment" (Article 104) or regular court-martial procedure. He made no personal gain from the transactions. Held, that such conduct was not only wrongful, but it deprived the soldiers of "due process of law," and compelled them to be parties to a fraud. A conviction of a violation of this Article was sustained (43-342).

26. The relative rank of the accused and the person to whom the false official statement or report is made is immaterial. So long as the person to whom the statement is made is acting in an official capacity in which he, or she has a right to require of the accused the information concerned, the accused's false statement in response constitutes a violation of this Article (30-1496) (40-453 [18]).



26a. A variance between allegation and proof as to the name of the officer to whom a false official report was made is not material when the accused is not misled or injured thereby (42-327).

27. The false certification of an incomplete statement of accounts as a complete statement is an offense under this Article, but proof of such false certification will not support conviction of a specification alleging the making of a false certificate to the effect that such statement of accounts was true and correct (30-1496) (40-454 [49]). Careful particularity in pleading is required in specifications charging false official statements. But when it was alleged in the specifications that certain false statements were made "on or about June 25" and the evidence showed that they were made on June 22, the slight variance as to date was held immaterial (43-340). (See Article 37, Annotation, par. 34).

28. The making of a false official statement as true, without information justifying a belief that it is true, is tantamount to the making of such statement knowing it to be false (30-1496) (40-453 [18], 454 [50]) (42-23).

28a. A lieutenant asked for a leave of absence. His captain told him that he could have it if he obtained the battalion commander's permission. Later the lieutenant reported to the captain "It's all right for me to go," establishing the inference that he had the battalion commander's permission, when in fact he had not asked or obtained it. His conviction under this Article was sustained (43-342). In another case an officer who was absent without leave from his unit at a certain Field, when asked by the Provost Marshal in a neighboring city whether he was absent without leave "from the Field," stated that he was not, a conviction was not sustained because it did not appear beyond a reasonable doubt that accused knowingly made a false statement. There was evidence that officers were allowed to leave the Field without special permission when they were not on duty and even though accused knew he was absent without leave from his organization there was no proof that he was absent without leave *from the Field* when he made the statement (43-344). And in another case, when an officer, who was under investigation for absence from duty, stated that he had been "sick in quarters," and it appeared that although he had been ill he had not been "on sick report," and had left the post and spent three quarters of an hour in a bar in town, a conviction under Article 96 was sustained (43-467).

29. The making of an "improper" statement or report, in the sense of being contrary to military duty, is a violation of (General) Article 96 rather than Article 95, and is included in a charge of making a false official statement in violation of Article 95 (30-Sup. 1496) (40-453 [19]).

29a. An officer was convicted of making a false affidavit. The affidavit was prepared by the regimental commander and handed to the accused who signed it and took it to the adjutant who asked him if he "swore to that as being the truth." Accused replied in the affirmative and the adjutant signed the jurat, and accused returned the completed document to the colonel. Accused knew that the affidavit was false. Held that the record was sufficient to support the conviction. No further formality was required to complete the oath (42-367).

29b. An officer stated that a pistol which had been issued to him had been lost, and offered to pay for it. About two months later the pistol was discovered among his effects. It appeared that he had found it himself a few weeks before this discovery, and although he did not report it as found he had worn it almost constantly. He was tried and convicted of making a false official statement. The conviction was disapproved because there was no proof that he knew where the pistol was when he stated that it was lost, and his failure to report his finding of it did not prove guilty knowledge because he did not attempt to conceal it, but wore it openly (43-312).

## VII. DOMESTIC RELATIONS

30. Bigamy, abusive treatment of wife, instituting fraudulent divorce proceedings, and inducing false evidence in same, are all violations of this Article (12-142, 143) (45-55). Bigamy is an offense under Article 95 or 96 without reference to the law of the State where the bigamous marriage took place (44-150). But an officer cannot be tried by court-martial for bigamy when the bigamous marriage was consummated before he entered the military service (44-277, 278).\*

30a. The conduct of an officer in falsely introducing to several persons as his wife a woman who is not his wife, under circumstances indicating a serious intention to deceive, and actual deception, is a violation of this Article (43-14, 312).

31. Failure or refusal to support a lawful wife is not an offense under this Article unless the conduct of the officer concerned in this respect has been such as to bring scandal, disgrace, or discredit upon the military service (30-1495) (40-453 [17]). Mere failure to support a child, as distinguished from refusal or failure to do so under circumstances that bring scandal or disgrace upon the military service, is cognizable under Article 96, not Article 95 (43-385) (44-64) (45-282).

32. A decree for alimony cannot be enforced against the pay of an army officer, but his failure to comply with such decree, if attended

\* In a bigamy case an officer's statement on his pay voucher that a certain woman was his wife, was held to be evidence of his knowledge that she was still living (49-74).

by circumstances reflecting discredit upon the military service, renders the officer liable to trial by court-martial for violation of this Article (30-1495) (40-453 [16]).

32a. An officer, who was a man of great wealth, prior to being commissioned had made a property settlement by which he agreed to pay his wife \$1250 a month until her death or remarriage, which agreement was confirmed by a divorce decree. After his appointment in the Army, he defaulted on the payments and, upon being sued for them, secured a stay of proceedings under the Soldier's and Sailor's Relief Act on the ground that he was prevented by military service from producing evidence that his former wife had secretly remarried. It was held that the officer should be given leave of absence to secure the evidence of the remarriage, and if he does not produce such evidence he should be subjected to disciplinary action for failure to conform to the Army standard of honor, whether or not the court continues the stay of proceedings (42-164).

33. The military authorities cannot compel an officer to comply with a decree of a civil court. They are concerned only with the question whether his conduct conforms to the Army standard of honor. If it does not, he may be disciplined, possibly extending to trial by court-martial and dismissal. But so long as an officer conducts himself honorably, his personal relations and private affairs are as much his own business as if he were not in the Army (42-274).

34. An officer's offenses against his family when decently cloaked in privacy, condoned by the persons affected, and held within the bounds of the family and home, are not necessarily the concern of military justice; but when the conduct in question transcends the bounds of private affairs and is such as to reflect discredit upon the military service, it properly may be prosecuted as a violation of A.W. 95 (45-422).

\* \* \* \*

*ARTICLE 96. GENERAL ARTICLE. Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court. (See M.C.M. 183).*

#### ANNOTATION

|   |       |
|---|-------|
|   | Pars. |
| I. IN GENERAL .....   | 1-3b  |
| II. CONDUCT TO THE PREJUDICE OF GOOD ORDER<br>AND MILITARY DISCIPLINE ..... | 4-7a  |

|  |        |
|--|--------|
| III. CONDUCT OF A NATURE TO BRING DISCREDIT<br>UPON THE MILITARY SERVICE ..... | 8-15a  |
| IV. CRIMES AND OFFENSES NOT CAPITAL .....                                      | 16-20a |
| V. SUBSTITUTION OF THE 96TH FOR OTHER<br>ARTICLES .....                        | 21-26  |

## I. IN GENERAL

1. This Article describes three classes of offenses, *viz.* (1) Disorders and neglects to the prejudice of good order and military discipline; (2) conduct of a nature to bring discredit upon the military service; and (3) crimes and offenses not capital. The latter class includes offenses of a civil nature which are not specifically mentioned in Articles 92 (Murder-Rape) and 93 (Various Crimes). The crimes named in those Articles should be charged thereunder (12-143).

2. "General incapacity" or "worthlessness" are not chargeable as offenses under this or any other Article. Specific acts constituting misconduct must be alleged (12-482). A charge of "habitual drunkenness" with specifications setting forth merely instances when the accused has been tried and convicted of drunkenness is a violation of the rule against double jeopardy, and improper (12-489). But a specification alleging that the accused, at a certain time and place, drank intoxicating liquor "to such an extent as to render himself unfit for the performance of duty as an officer of the army" charges an offense under this Article although the particular duty which the officer rendered himself unfit to perform is not specified (30-1465 (40-454 [91])).

2a. Under a specification for being "drunk and disorderly in uniform in a public place" under Article 96, the court in its findings excepted the words "was drunk and disorderly in uniform" and substituted the words "did conduct himself in a manner to bring discredit upon the military service." By this action the court acquitted accused of the specific conduct charged and convicted him of the charge (*viz.* conduct of a nature to bring discredit upon the military service) without any supporting specification of facts to constitute the offense. Furthermore, having acquitted the accused of the conduct alleged in the specification upon which he was arraigned, any acts which the court may have intended to find by its substituted words must have been other than those charged and therefore a separate and distinct offense (43-187).

3. Under this Article, as in all other cases, the specification must contain language showing that the act complained of is alleged to have been wrongful or unlawful, or that it constituted a disorder or neglect, crime or misdemeanor, otherwise no offense will be stated. The specification must be so drawn that if the facts are as alleged the accused cannot be innocent (30-1471) (40-451 [44]). A specification

stating merely that accused "drove a motor vehicle while drunk" without alleging that the act was wrongful, unlawful, or done on a public road or way, fails to specify an offense (43-17). The use of the term "feloniously" in a specification charging an offense not a felony, while irregular and unnecessary, is not a material error. The term in its broad sense connotes a wrongful or unlawful act (43-305, 306). In a prosecution for a violation of general orders, the failure to include in the specification a reference to the orders in question does not prejudice the substantial rights of the accused when the specification fairly apprises him of the offense charged (46-340, 341) (48-35, 36).

3a. Reaching into foot lockers of other soldiers without permission, there being no evidence that accused took anything or did any damage, is a mere technical trespass upon personal property, and, in the absence of intent to steal or damage, does not amount to a violation of this Article (42-365).

3b. Acceptance by an officer of a gift of \$500 from a Government contractor with whom he has official relations is flagrantly improper and a violation of this Article. Also the rendition of professional services for such contractor is contrary to Army Regulations and a violation of this Article; and his acceptance of compensation for such services is not only a violation of this Article but contrary to the Federal statute against such practices (M.L.U.S. 842) (43-343).

3c. Carrying, by an officer, of a concealed weapon (pistol) incident to its use, later, for an unlawful assault upon his wife, is a violation of this Article (45-340).

## II. CONDUCT TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE

(See M.C.M. 183a)

4. The following have been held to constitute offenses of this class: Absence without leave to avoid a practice march—in addition to the violation of the 61st Article (Absence without leave) involved; publishing adverse comment upon the official conduct of another instead of making a report through proper channels (12-144); disrespectful remarks in regard to his captain by a soldier on detached service (12-148); striking a soldier by an officer except in self defense or necessary restraint (12-503); false statement to a military policeman by a soldier not on duty (30-1448) (40-454 [49]); borrowing money by an officer from an enlisted man under circumstances involving abuse of trust and confidence; unreasonable delay by an officer to repay a loan from an enlisted man; borrowing money by an officer from an enlisted man whom the officer has known but a short time and only officially. Borrowing of money by a superior from a subordinate is not con-

ductive to proper military discipline, and when a superior puts himself in the position of debtor to a subordinate, any breach, no matter how slight, of the word of the superior in the transaction is of necessity prejudicial to good order and military discipline (30-1453) (40-454 [19]). Conspiracy to commit a crime is a violation of this Article, although no overt act to carry it out is alleged or proved (40-454 [23]) (47-243, 244). Drinking intoxicating liquor by an officer with enlisted men is a violation of this Article (30-1464) (40-453 [9]) (43-313, 342). Gambling by an officer with enlisted men is a violation of this Article (44-423). Neglect of duty by an officer in the supervision and administration of a Government contract, resulting in the certification of claims of the contractor against the Government containing improper items, is a violation of this Article (45-235). Solicitation to commit perjury is a violation of this Article (47-298). Also failure by an officer to bring offending inferiors to punishment (48-141, 142).

4a. The borrowing of money by an officer from non-commissioned officers of his organization is conduct clearly prejudicial to good order and military discipline (42-106). It is prejudicial to good order and military discipline for an officer to borrow money from an enlisted man in the same organization (43-144, 313). But when a loan is proffered by a soldier, not for the personal convenience of the officer, but to facilitate a transfer of "company funds," and there is no suggestion of an abuse of relationship between the soldier and his company commander, the case is exceptional and not subject to the general rule (43-190, 191). Borrowing money by an officer from a civilian employee in a transaction purely personal is not an offense under this Article unless some extraordinary circumstances are shown. It is not analogous to borrowing from a soldier. (44-345).

4b. The "sale" of military privileges, such as a furlough, by an officer to a soldier is a violation of both Articles 95 and 96 (43-239). An officer who accepts money from a soldier for obtaining the soldier's discharge from the service is guilty of violation of both Articles 95 and 96 (44-237).

4c. The accused (officer) had a brother-in-law who was an enlisted man with a "very unsatisfactory" record. Accused by instructions to an officer under his command, obtained the brother-in-law's transfer to a unit for which he had no qualifications, and also by improper exercise of his authority, procured the brother-in-law's promotion to Staff Sergeant and assignment as accused's "confidential clerk." The officer's conviction under this Article was sustained (43-272).

4d. Breach of restraint, or restriction, is a violation of this Article, and when an accused contended that he had left the limits of his restraint on Government business but failed to produce sufficient evidence to establish his contention, his conviction was sustained. But

when an accused was restricted to his regimental area and the proof was merely that he was absent from his company and office, and there was no evidence that he had left the regimental area, the conviction was set aside (43-313). Only the authority competent to order an accused into arrest is competent to direct his restriction in lieu of arrest, in his discretion (47-298, 299).

4e. The submission by a student officer in a service school, of parts of approved solutions as his own, is a violation of this Article, although there were no specific instructions against the use of approved solutions, it being generally understood that they should not be used (44-63, 64).

4f. The wearing of the uniform of an enlisted man by an officer, and appearing in public thus dressed without authority, is *per se* conduct in violation of this Article (44-64).

4g. The loss, destruction or other disposition by a soldier, by design or wilful negligence, of spectacles or dentures issued to him, with intent to incapacitate or unfit himself for full military duty, or to delay his shipment overseas, is a disorder or neglect to the prejudice of good order and military discipline in violation of this Article (44-126).

4h. An officer was convicted of wrongful failure to stop cruel treatment of enlisted men, in violation of Articles 95 and 96. The men were prisoners in a battalion stockade. The treatment complained of was administered by order of the battalion commander given, not to the accused who was battalion provost marshal, but to his assistant sergeants who carried them out, the battalion commander being present during the entire time. Conviction disapproved. Held: Accused was under no obligation to prevent compliance with an order, even though illegal, given directly to his guards by his superior officer. The case is distinguishable from one wherein the acts of cruelty are performed directly under the supervision and control of the accused without interference of superior authority (44-346).

4i. The making of a false official statement by an officer that a certain private debt had been paid, may be charged as a violation of this Article (44-382).

4j. The act of a junior officer in fostering disaffection among the enlisted men against their commanding officer and encouraging them to write letters to the Inspector General censuring the company commander with the purpose of causing his removal, is a violation of this Article (44-382).

4k. Loaning money by an officer to enlisted men at exorbitant rates of interest is an offense under this Article (45-234).

5. Disloyal statements or conduct by military personnel, though not sufficient to constitute violations of any statute, may nevertheless con-

stitute conduct to the prejudice, etc., under this Article. Conscientious objection to war is no defense to a charge of making disloyal statements (30-1462, 1467) (40-454 [31] [32]). "Fraternizing" with prisoners of war may be a violation of this Article (44-471).

5a. Statements by an officer to some of his men that "we are fighting on the wrong side, Germany has a better democracy than we have, and the United States will be a colony of England after the war and I will resist it," constitutes a violation of Article 96 warranting a sentence of dismissal (43-16). In a prosecution for an attempt to cause a mutiny the proof must disclose some overt act by the accused with the specific intent to influence someone else to mutiny, and proximately tending to, but falling short of, such a consummation (44-150).

5b. In an investigation into the propriety of his induction into the Army, a naturalized citizen of German ancestry declared that he thought the United States was at fault in this war, that Germany was justified in fighting, though he was not in sympathy with the Nazi regime, that he did not understand his naturalization entailed a pledge to bear arms, and that he would refuse to do so even though it resulted in the loss of his citizenship. There was no evidence of subversive acts or an attempt to influence others. Such honest expressions of personal opinion when called upon to speak in an official investigation cannot be said to constitute a violation of the Articles of War. If he had lied he would have been subject to trial, and if he had remained silent he would have been guilty of legal fraud in concealing his true sentiments (43-191).

5c. A soldier who voluntarily, and not in the course of an official inquiry, writes and mails letters in which he gives expression to disloyal statements, thereby brings discredit upon the military service. The offense is complete when such letters are put into the mail by the accused (45-56).

6. Disobedience of general orders should be charged under this Article. The order or "command" referred to in Article 64 is an express, personal one, addressed to the accused personally, as distinguished from one of general scope issued to the command as a whole (30-1463) (40-422 [5]). But the mere declaration of an intention to refuse to perform company duty because of an asserted physical incapacity, made by a soldier to his company commander in the course of a friendly talk, not in the presence of others, is not an offense punishable under any Article of War (45-180, 181). Under a specification alleging violation of a general order it must be shown that accused had, or should have had, knowledge of the order. Distribution of such order to the units does not establish distribution to the individual soldier or knowledge on his part of its contents (45-488, 489). But where a general order relating to fraternizing with German



civilians had been widely publicized and was generally known by the occupation forces, and accused (an officer) did not claim lack of notice, it was held that the court might infer that accused had knowledge of the non-fraternization policy (46-211, 212). A conspiracy to violate a lawful standing order is a violation of this Article (46-340).

6a. A violation of "flying orders" not to fly a plane lower than a certain altitude is a violation of this Article (43-271). Operating an Army airplane in a reckless and careless manner in violation of regulations is a violation of this Article (44-382, 383).

6b. A general order requiring the Commanding General's approval of a soldier's marriage in a foreign country is valid and a violation thereof is punishable under this Article (43-429). See Article 64, Annotation, par. 12 (45-14).

6c. An order requiring all military personnel who can do so, to speak only the English language, is legal if, by its terms, conditions, and the manner and circumstances of its enforcement, it has a reasonably direct and substantial relation to military needs; and failure to obey such a lawful order is a violation of this Article (44-346).\*

7. Refusing to submit to an inoculation or other standard medical or surgical treatment recognized as an essential curative or preventive measure for the preservation of the health of a soldier constitutes conduct to the prejudice, etc., under this Article (30-1481) (40-454 [77] [78]). Self-maiming is an offense of this class (30-1482) (40-454 [82]); but the failure of a soldier to disclose the fact that he has a venereal disease cannot be punished as a violation of this, or any other Article, because to do so would penalize him for failure voluntarily to incriminate himself (30-1488) (40-454 [45]). Refusal to submit to dental treatment necessary to enable a soldier properly to perform his military duties, is a violation of this Article punishable at the discretion of the court (44-14).

7a. The offense of self-maiming for the purpose of unfitting oneself for the full performance of military duty, in violation of Article 96, is a purely military offense, and consequently cannot be punished by confinement in a penitentiary (44-516). See Art. 42, Anno., par. 2c. The limit of confinement authorized by the most closely related Federal statute (18 U. S. Code, 462) is seven years (45-90, 91). It has been held that a sentence of one and one-half years was not excessive where accused was convicted of willfully shooting himself in the leg with a pistol and the evidence showed that the injury was serious, though not permanent (47-244, 245).

\* 6d. An accused was convicted of three violations of standing orders. Held (under M.C.M. 117c, pp. 142, 143) that the sentence might include a bad conduct discharge and total forfeitures, but not a dishonorable discharge (49-76, 77).

III. CONDUCT OF A NATURE TO BRING DISCREDIT  
UPON THE MILITARY SERVICE

(See M.C.M. 183b)

8. The following are offenses of this class when committed under circumstances which would bring discredit upon the military service: Drunkenness when not on duty (12-148, 488); disturbance on private premises (12-148); failure to pay debts (12-878, 879; 30-395) (40-454 [46]); wife desertion without just cause (30-1449) (40-454 [48]); failure without just cause to support family (30-417, 418) (40-454 [4] [48]). All these offenses when committed by an officer would, generally, be laid under Article 95 (Conduct Unbecoming). The conviction of an officer for being drunk and disorderly in a public place on two identical specifications under Articles, 95 and 96, respectively, is not double jeopardy, and there is no inconsistency in the findings of guilty of both charges, but it should be considered as a single offense in fixing the penalty (43-96). Dismissal is, of course, mandatory because of the conviction under Article 95. A false declaration by a person subject to military law, made in the form of an affidavit before an officer not authorized to administer the oath thereto, is not "false swearing," but it is an act which brings discredit upon the military service, punishable under Article 96 within the limits of punishment authorized for making a false official report or statement (44-423).

8a. The War Department will not attempt to enforce a court order against a soldier (warrant officer) for payments due his wife under said order for separate maintenance but it may discipline the soldier under this Article for willful refusal to comply with such orders, and in so doing it will not question the jurisdiction of the court which issued the order (42-23).

8b. An officer was threatened with bastardy proceedings. He denied responsibility but settled the matter by entering into an agreement to marry the complainant and support her until the birth of the child, his liability then to terminate. Held, that such agreement was against public policy and void; that the officer was bound to support his wife and child until relieved of the obligation by decree of court, and that if he failed to do so he might be subject to disciplinary action (42-365). The vacation of a divorce decree obtained by an officer against his wife restores the status of the parties as it was before the divorce, irrespective of the officer's subsequent marriage to another woman. In such case, in the absence of an order of a court of competent jurisdiction relieving him from responsibility, he is still under obligation to support the first wife (46-341).

8c. The issuing of worthless checks with knowledge of insufficient funds and without making any actual and definite arrangements

for their payment by the bank upon which they are drawn is a violation of this Article (43-269). A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Proof that a check given for value by an officer or soldier, is returned "for insufficient funds," imposes upon the drawer when charged with conduct to the discredit of the military service, the burden of showing that his action was the result of honest mistake not caused by his own carelessness or neglect (44-290) (47-182). In order to support a conviction for issuing a check upon a certain bank without having or intending to have sufficient funds or credit in said bank to meet it, the fact of insufficient funds or credit must be established by competent evidence. When a check was cashed by a person who deposited it in "his own bank" (not the bank upon which it was drawn) and it was returned to him marked "No such account," and there was no evidence to show that it was ever presented to, or dishonored by, the bank upon which it was drawn, the conviction was disapproved (46-212, 213). But a variance between a specification alleging the drawing of a check on a bank in which accused did not have "an account," and proof that he had had an account in said bank which was exhausted by previous checks, and the substitution by the court of the words "sufficient funds" for "any account," was held to be immaterial. The essence of the fraud is that the check was of no value. Whether drawn against no account or an empty account amounts to the same thing (46-213). (See also par. 13, this Annotation).\*

8d. "Intoxication" induced by a drug prescribed by a doctor as medicine is not an offense under this Article (43-343).

9. The military authorities do not ordinarily interfere in the domestic affairs of officers or men unless it is shown that their conduct in relation thereto reflects discredit upon the service (30-419, 649) (40-454 [48]).

9a. An officer's mere failure to support his minor child, unless the circumstances are such as to bring scandal or disgrace upon the military service, is cognizable under Article 96 rather than Article 95 (43-385).

10. Unlawful cohabitation may constitute a violation of this Article, but if a man lives in open relationship as man and wife with a woman not his wife, in the belief that he was lawfully married to her, he is not guilty of a violation of this Article even though the marriage was in fact void (30-1458) (40-452 [7], 454 [63]).

\* In "bad check" cases involving charges as shown in Form 110, M.C.M. App. 4, where mere carelessness is shown, the following is suggested as appropriate findings to cover the lesser included offense under A.W. 96: "That the accused uttered said check without having, and without intending to assure that he should have, sufficient funds in the drawee bank for payment thereof, in violation of A.W. 96." (40-76).

11. Knowingly marrying a prostitute is a violation of this Article (30-1476) (40-454 [68]).

12. Impersonating an officer, with or without "intent to defraud," is conduct to the discredit of the service in violation of this Article, punishable as now specified in the Table of Maximum Punishments, M.C.M. 117c) (40-454 [62]).

13. Obtaining money, or other property, by means of a worthless check by a person in the military service, with or without intent to defraud, is conduct to the discredit of said service in violation of this Article, punishable as indicated in the Table of Maximum Punishments (M.C.M. 117c), unless the accused can show that his act was an honest mistake, not caused by his own carelessness or neglect (45-341).

14. The writing and delivering of an obscene letter may be a violation of this Article, and since such an offense is closely related to that of sending obscene matter through the mails the penalty should not exceed that prescribed for the latter offense (30-1477) (40-454 [71]). It is not essential to the offense of depositing an obscene letter in the mail that the letter be so deposited by the offender himself, or by another acting upon his express direction. It is sufficient that it was deposited in the mail as a natural consequence of an act intentionally done by him with knowledge of its probable effect. For an officer, this offense is a violation of Article 95 as well as Article 96 (44-291).

15. Wilfully altering a public record, with intent to conceal a fact which the accused did not want to be revealed, is an act of a nature to bring discredit upon the military service (30-Sup. 1449 c) (40-454 [5]).

15a. Reckless driving of a motor vehicle, driving while drunk, "hit and run" driving, negligent homicide, wrongful taking and use of a motor vehicle, or other property, belonging to another, are all violations of this Article now listed in the Table of Maximum Punishments (M.C.M. 117c), punishable as therein indicated.

#### IV. CRIMES AND OFFENSES NOT CAPITAL

(See M.C.M. 183c)

16. The phrase "all crimes and offenses not capital" as here used does not include crimes denounced by State laws, but if acts constituting a violation of a State statute are such as to bring discredit upon the military service, they may be charged under this Article without reference to the local law infringed (30-Sup. 1448) (40-454 [1] (44-346). And in such case the State statute does not control the maximum punishment that may be imposed (45-13, 14, 57).

17. The following are instances of offenses which have been prosecuted under this Article: False swearing (see Article 93, Annotation VIII, 82) (12-147); disloyal statements not amounting to treason (30-

1462) (40-454 [31]); homicide not amounting to murder or manslaughter (30-1617) (40-454 [65] [84]); careless discharge of firearms on a public highway (30-1457) (40-454 [92]); unlawful possession or selling of drugs, but the accused should not be charged with both possession and use where both offenses are merely different aspects of the same act (30-1478) (40-402 [2], 454 [73]); statutory rape (unlawful sexual intercourse with a female under the age of consent) (30-1485) (40-454 [88]); offering to commit sodomy (30-1486) (40-454 [15]); offering, without authority, to sell Government property (30-1489) (40-454 [104]). The use, by an officer, of Government facilities to obtain repairs to his private automobile without authority, is a violation of this Article (44-101). A soldier on duty in an Army post office, though not a bonded Army mail clerk or assistant, but whose duties require him to handle first class mail which has not passed out of control of the post office, may be convicted of the larceny of property from the U. S. mail in violation of 18 U. S. Code sec. 317, and Article 96 (44-151). Violation of the "Mann Act" is punishable under this Article (45-340).

17a. The corrupt making of contradictory statements under oath may be, in itself, an offense under this Article, but it is not included in a charge of false swearing, and in the absence of proof of the falsity of the statements made, is not false swearing (42-216).

17b. An accused was convicted of an attempt to murder under Article 96. He had fired several shots, in the night-time, through a tent into a cot where a certain sergeant usually slept with the confessed intent to kill the sergeant. The attempt failed because neither the sergeant nor any one else was in the tent at the time. Held, that accused's act, under the circumstances, was an attempt to murder notwithstanding the fact that the intended victim, because of his absence, was not actually endangered (43-14-16).

17c. The mere suggestion by an accused to another soldier that he permit an indecent familiarity is not sufficient to establish solicitation to commit sodomy (43-192).

17d. Unlawfully and riotously breaking into a dwelling and destroying property therein is a violation of this Article punishable as for housebreaking under Article 93 (43-383).

17e. Unlawful conversion of property is an offense under this Article. In such case it is immaterial whether the converter acquired possession of the property by trespass or otherwise. To receive property from one who has no right to part with it, and thereafter to use, sell, or exercise dominion over it, whether with knowledge of the owner's rights, or even in good faith without such notice, constitutes wrongful conversion (44-347).

17f. The crime of blackmail is a violation of this Article, and may be punished by penitentiary confinement (44-422).

17g. The offense, by a soldier, of "having opium in his possession aboard a military train" is a violation of this Article, but when the allegations and proof are not sufficient to bring it within any of the Federal narcotic laws, it is punishable only within the limits prescribed for the offense of "introducing a drug into command, quarters, camp or station" for any purpose other than sale (44-515, 516).

17h. Failure by an accountable finance officer to account for public moneys committed to his charge, and not authorized to be retained by him as salary or emolument, is a violation of section 90 of the Federal Criminal Code amounting to embezzlement (M.L.U.S. 829) punishable under Article 96 within the classification of "Crimes or Offenses Not Capital" (46-282, 283).

18. Bigamy is included in this class of offenses, but an accused should not be charged with bigamy and adultery with the same woman. The fact that accused believed that he had been divorced from his wife is no defense if it is shown that such belief was erroneous and he had not used reasonable diligence to ascertain the fact (30-1452) (40-454 [17] [18]). It is no defense to a charge of bigamy that the second marriage was void on other grounds (43-385). Bigamy is an offense under Articles 95 or 96 without reference to State laws (44-150) (45-55). Voluntary drunkenness is not a defense (45-387).

18a. A charge of "wrongfully, dishonorably and unlawfully living and cohabiting with a woman not his wife" implies a continuous adulterous relationship and cannot be established by proof of a sojourn with the woman for a portion of a single night, but such proof under the charge specified is sufficient to establish the lesser included offense of "occupying a room with a woman not his wife" in violation of Article 96 (42-23). An accused (officer) was convicted of living in a state of open adultery in violation of Article 96. The evidence showed that he had rented a sleeping room and occupied it for a month with a woman not his wife. Held, that the circumstances warranted an inference of adultery. Conviction sustained (43-14) (44-345). "Cohabitation" is the dwelling or living together of a man and woman but does not necessarily include sexual intercourse. Although sexual intercourse may be implied, it is not necessary to prove such relation to establish unlawful cohabitation. Consequently illicit sexual intercourse is an offense separate and distinct from, and not a lesser offense included in a charge of unlawful cohabitation (47-69).

19. The fraudulent enlistment of a soldier by concealing the fact that he is already under a prior existing enlistment, is chargeable under this Article although he has received no pay or allowances under such fraudulent enlistment (30-1472) (40-454 [58]). Likewise, leaving station without authority with intent to report elsewhere is a violation of this Article punishable within the same maximum limits as for desertion terminated by surrender (30-1479) (40-416 [12]).

20. A specification alleging merely that accused was arrested, tried, and convicted by the civil authorities for a certain offense does not charge a violation of this Article. The specification should set forth the specific conduct relied upon. The aggravating circumstances of arrest, trial, and conviction by the civil authorities may be added if desired (30-Sup. 1448) (40-454 [34]).

20a. The unauthorized making or alteration of a military pass, leave, or discharge certificate, or the possession, selling or other disposition of such false document, constitutes a violation of this Article, punishable by a maximum penalty of dishonorable discharge and confinement at hard labor for three years (M.C.M. 117c).

## V. SUBSTITUTION OF THE 96TH FOR OTHER ARTICLES (See M.C.M. 78b)

21. When a charge is laid under another Article and the specification does not allege facts sufficient to constitute the offense charged, but does state facts sufficient to constitute a violation of Article 96, the pleading is sufficient to constitute the legal basis for a conviction and sentence under this Article (12-512; 30-1461) (40-394 [2]).

22. When a crime or offense not capital is charged under this Article and the proof is not sufficient to support a conviction of the specific offense charged, but is sufficient to show that the act or acts alleged and proved constituted conduct to the prejudice of good order and military discipline, or to the discredit of the military service, conviction of a violation of Article 96 will be sustained (12-147; 30-1451, 1460) (40-454 [1]). Where an offense is charged under a specific Article, the accused may be convicted of a lesser included offense under Article 96 (e.g. in a charge of robbery under the 93d Article, the accused may be convicted of assault under the 96th) (30-1450) (40-451 [59]). It is never proper, however, for the court, by exceptions and substitutions, to convict the accused of acts not included in the specification upon which he was arraigned, and thus find him guilty of an offense involving conduct with which he had not been charged (30-1448, 1469) (40-395 [45]). The court may not, by exceptions and substitutions, change the nature or identity of the offense charged. So, when an accused was charged with one offense of absense without leave, and the court, by exceptions and substitutions, convicted him of two such absences, the conviction of the second absence was disapproved although both absences were included in the period originally specified (43-380). Also when an accused was charged with "wrongfully taking and using" a car at one place, and the court convicted him of "wrongfully having" the car at another place, the conviction was disapproved (43-140, 141). See also, par. 2a this Annotation. Under a charge of wrongfully and know-

ingly selling government-owned tires in violation of A.W. 94, a conviction of wrongfully permitting the selling of the tires in question in violation of A.W. 96 was disapproved, because the latter was not a lesser offense included in that charged (48-189, 190).

23. The following are instances of substitutions of offenses under Article 96 which have been held *proper*: Breaking and entering, for burglary under the 93d (30-1456) (40-451 [14] [15]); false swearing, for perjury under the 93d (30-1470, Sup. 1582) (40-451 [52]); fraudulent conversion, for embezzlement under the 93d (30-1471) (40-451 [21]); making an "improper" statement, for making a false official statement under the 95th (30-Sup. 1496) (40-453 [19]); "wrongfully" failing to maintain a sufficient bank balance to meet a check, for "dishonorably and wrongfully" so failing under the 95th (30-Sup. 1497) (40-453 [22]); sleeping on post as a "watchman," for sleeping on post as a sentinel under the 86th (30-Sup. 1548); simple assault, for assault with intent to commit rape under the 93d (30-Sup. 1560) (40-451 [4]); assault and battery, for assault with intent to do bodily harm by stabbing with a knife, also simple assault for assault with intent to do bodily harm, under the 93d (30-Sup. 1560 *b*) (40-451 [13]); wrongful taking and carrying away, for larceny under the 93d (30-Sup. 1573) (40-451 [40]) (42-18, 20). Also, failure to comply with an order, for wilful disobedience under Article 64 (42-159, 160). See also Article 95, Annotation, par. 28a, last citation. Also conduct to the prejudice of good order and military discipline for misbehavior before the enemy under Article 75 (44-342). Also breach of restriction for breach of arrest under Article 69 (45-11).

24. The following are instances of substitutions under the 96th which have been held *not proper*: "Borrowing" government property from a soldier, for misappropriating the same under the 94th (30-1453) (40-452 [19]); breach of parole, for escaping from confinement under the 69th (30-1454, 1455) (40-427 [6]); conspiracy to commit larceny, for larceny under the 93d, and receiving stolen property, for robbery under the 93d (30-1459, 1480) (40-451 [43]); wrongful possession of property, for larceny under the 93d (30-1487, Sup. 1578) (40-451 [43]); being drunk and disorderly, for assaulting an officer under the 64th (30-1465) (40-422 [2]); failure to report a conspiracy to escape, for actual participation in such conspiracy under the 96th (30-1468) (40-454 [25]); loitering on post or failure to perform duty as a sentinel, for sleeping on post or leaving post before being properly relieved under the 86th (30-1483) (40-444 [2]); opening and preventing delivery of mail, for destroying same, both under the 96th (30-Sup. 1461a) (40-454 [30]); assault and battery, for assault with intent to commit rape under the 93d (30-Sup. 1560) (40-451 [4]); knowingly and wilfully misappropriating property, for larceny under the 93d (30-Sup. 1578) (40-451 [43]).



25. Substitutions of the 96th Article, when charges have been improperly laid under another Article, have been approved in the following cases: Escape from civil confinement, improperly charged under the 69th (30-1466) (40-427 [4]); conduct improperly charged as perjury under the 93d but which, by both allegations and proof, amounted merely to making a false official statement in writing (30-1470) (40-451 [52]); fraudulent taking of certain checks with intent to convert them to the taker's own use, improperly laid under the 94th (30-1471) (40-394 [2]); an officer charged with being drunk in public under the 95th, where the evidence showed slight intoxication with no disorderly conduct (30-Sup. 1463 *a*, 1493) (40-453 [12]); wrongful selling of revolvers issued for use in the Naval Service, improperly laid under Article 84 (45-137).

25a. When an accused was convicted of being drunk while on guard (not on post) in violation of Article 96, the conviction was sustained, but as it was, in essence, a violation of Article 85 (Drunk on Duty) the limitation of punishment prescribed under the latter Article should apply (43-309).

26. When an accused was tried for two offenses, one under the 93d and one under the 96th, both of which were involved in the same act, and the trial resulted in conviction of the first and acquittal of the second, it was held that inconsistent verdicts of guilty and not guilty in the same criminal proceeding do not vitiate the conviction (30-Sup. 1563) (40-395 [44]) (44-235, 236, 285).

## CHAPTER XVI

### COURTS OF INQUIRY

*ARTICLE 97. WHEN AND BY WHOM ORDERED. A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into.*

#### ANNOTATION

1. The appointment of a court of inquiry is not obligatory. If it appears that the real purpose of the request is to obtain the opinion of the court upon a matter not a proper subject for such inquiry, the request should be refused (12-178).

2. The statute of limitations (Article 39) does not apply to proceedings before courts of inquiry (12-579).

3. A court of inquiry is restricted in its jurisdiction to persons in the military service (12-178). It cannot be ordered in the case of a civilian employee of the military service. A body of officers convened to inquire into the case of an officer who had been legally dismissed, and is thus no longer in the military service, is merely a board of investigation and is not invested with any of the special powers of a court of inquiry or a court-martial (12-586).

4. This Article has no application to a reserve officer in an inactive status (30-1424) (40-455).

5. The courts of inquiry provided for in Section 24 *b* of the National Defense Act (M.L.U.S. 141) concern only officers of the regular army who are placed provisionally in Class B (30-1424) (40-455); and any such officer who waives the privilege of having a court of inquiry cannot, after his final classification, demand it as a matter of right (30-148, Sup. 155 *a*) (40-141 [8] [11]).

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*ARTICLE 98. COMPOSITION. A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder.*

#### ANNOTATION

1. Retired officers may be appointed as members of courts of inquiry. The court of inquiry which investigated the Brownsville, Texas, affray which occurred in 1906, was composed entirely of retired officers except the recorder (12-996, 997).

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*ARTICLE 99. CHALLENGES. Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time. The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection if such counsel be reasonably available.*

#### ANNOTATION

1. Members of a court of inquiry may be challenged for cause, but not peremptorily (12-178; 30-149) (40-141 [12]).

\* \* \* \*

*ARTICLE 100. OATH OF MEMBERS AND RECORDERS. The recorder of a court of inquiry shall administer to the members the following oath: "You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."*

*In case of affirmation the closing sentence of adjuration will be omitted.*

*ARTICLE 101. POWERS; PROCEDURE. A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the*

*oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question.*

## ANNOTATION

1. Courts of inquiry are governed by the same general principles of military law as courts-martial. The person whose conduct is the subject of inquiry is entitled to be represented by counsel, to challenge members of the court for cause, to examine and cross-examine witnesses, and to present depositions; and a court of inquiry lawfully cannot deprive him of the right to call witnesses believed by him to possess knowledge of facts vital to the case, or, in a proper case, to take the depositions of such witnesses (12-178; 30-145, 149) (40-141 [8] [12]).

2. Witnesses should be sworn and the rules of evidence prescribed in the Manual for Courts-Martial should, in general, be observed; but not being a judicial proceeding, a court of inquiry is not held to as strict an enforcement of these rules as a court-martial, particularly as to the "hearsay" rule (30-145, 149) (40-141 [9]).

3. Witnesses before courts of inquiry are subject to objections as to competency. If witnesses are called by the court, the person under inquiry has the right to call witnesses or produce documentary evidence in rebuttal, and a request for a continuance for this purpose, based upon reasonable grounds, should be granted. The matter rests in the sound discretion of the court (30-149) (40-141 [12]).

4. In class B courts of inquiry (*i.e.* those convened under Sec. 24 b. N. D. Act) the rule excluding "opinion" evidence must, of necessity, be considerably relaxed. Efficiency reports are mainly expression of opinion, but they are admissible for the reason that they constitute the basis of the officer's classification, and the court of inquiry is called upon to examine into the sufficiency of such basis. Efficiency reports are also, in a sense, expert opinions and admissible as such. Likewise the testimony of an officer who made such a report, or that of any other witness qualified to express an opinion on the case, is admissible before the court of inquiry, as is also any testimony tending to weaken the effect, or diminish the weight, of such efficiency reports or other expert testimony (30-145) (40-141 [9]).

5. Courts of inquiry in class B cases, not being punitive in nature, are not restricted in their proceedings by the rule against double jeopardy (30-151, 155) (40-141 [3] [4]). A conviction by court-martial, disapproved on account of some irregularity in the proceedings, does not bar a "class B" court of inquiry from examining into the facts upon which the charges were based; but an acquittal by a court

martial upon the merits should be accepted by the court of inquiry as conclusive of the innocence of the officer concerned of the particular offense involved. Collateral issues may, however, be considered (30-152) (40-141 [4]).

6. In a "class B" court, the officer under inquiry is entitled to have all the allegations against him presented in order that he may be afforded an opportunity to meet them (30-145) (40-141 [9]).

\* \* \*

*ARTICLE 102. OPINION ON MERITS OF THE CASE. A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so.*

### ANNOTATION

1. When the inquiry is instituted to assist superior authority to determine whether the party should be brought to trial, the opinion of the court of inquiry (if an opinion is ordered) should be whether the court-martial charges should be instituted, with the reasons for the conclusion reached. When convened to investigate questions of right, responsibility, conduct, etc., the opinion should be confined to the questions submitted to the court for inquiry and matters pertinent thereto (12-178, 179).

2. A court of inquiry acts by majority, and if a member or members cannot conscientiously agree with the majority they may present a minority report. In fact this is sometimes desirable as it gives the convening authority the benefit of opposing views (12-179).

3. A "class B" court of inquiry is not authorized to revise or review the findings of the classification board. It should, however, make and report findings upon any pertinent matters presented to the court which were not considered by the board (30-146) (40-141 [10]).

\* \* \*

*ARTICLE 103. RECORDS OF PROCEEDINGS-HOW AUTHENTICATED. Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court.*

### ANNOTATION

1. The officer concerned in a "class B" inquiry is entitled to a copy of the proceedings of the court (30-147 (40-141 [1])).

## CHAPTER XVII

### MISCELLANEOUS PROVISIONS

*ARTICLE 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS. Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command, may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.*

*The disciplinary punishments authorized by this article may include admonition or reprimand, or the withholding of privileges, or extra fatigue, or restriction to certain specified limits, or hard labor without confinement or any combination of such punishments for not exceeding one week from the date imposed; but shall not include forfeiture of pay or confinement under guard; except that any officer exercising general court-martial jurisdiction may, under the provisions of this article, also impose upon a warrant officer or officer of his command below the rank of brigadier general a forfeiture of not more than one-half of his pay per month for three months.*

*A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty. (As amended by S.S.A. '48, effective Feb. 1, 1949). (See M.C.M. 32-34 and Chap. XXVII).*

## THE ARTICLES OF WAR

## ANNOTATION

|  | Pars. |
|--|-------|
| I. IN GENERAL .....                      | 1-2   |
| II. APPLICABLE TO MINOR OFFENSES ONLY .. | 3-3a  |
| III. WHO MAY ADMINISTER .....            | 4-6d  |
| IV. PUNISHMENTS .....                    | 7-13  |
| V. APPEALS .....                         | 14-15 |
| VI. SUBSEQUENT TRIAL .....               | 16-18 |

## I. IN GENERAL

1. Prior to 1916 the code contained no such Article as this, but its principle has long been recognized in our service. See instances cited in (12-580). The present amended Article does not differ substantially from the former, except as to the authority of a commander having general court-martial jurisdiction to impose upon a warrant officer, or officer of his command below the grade of brigadier general, a forfeiture of not more than half his pay per month for three months. Such power was formerly restricted to "time of war or grave public emergency" and was limited in application to officers (not including warrant officers) below the grade of major, and could not exceed half pay for one month. See M.C.M. Chap. XXVII for rules of procedure.

2. The power of admonishment is entirely distinct from the disciplinary punishments authorized by this Article. Administrative admonition, however adversely it may affect the person concerned, is not punitive (30-1432, Sup. 1432) (40-462 [2] [3] pp. 977, 978) (43-377).

## II. APPLICABLE TO MINOR OFFENSES ONLY

3. Disciplinary punishment under this Article is not authorized for serious offenses (30-1433 (40-462 [2]) (44-192). However, a commanding officer should resort to this Article, in the first instance, in every case to which it is applicable, and in which he deems punishment necessary, unless it is clear that such summary punishment will not meet the ends of justice and discipline (M.C.M. 118). See Art. 46, Annotation, par. 22.

3a. In determining whether an offense is a "minor" one under military law, courts-martial are not bound by the definition of "felony" used in a State statute (45-342).

## III. WHO MAY ADMINISTER

4. The power to administer punishment under this Article may not be delegated; but a letter of admonition expressing the commanding officer's orders in the case may be signed by an appropriate staff officer (30-1433) (40-462 [1]).

5. If the accused has been transferred to another command, the former commanding officer has no jurisdiction to act under this Article, and his attempt to do so is a nullity (30-1433) (40-462 [1]).

6. A commanding officer, upon his return to his command after an absence on leave, is authorized to administer punishment under this Article for an offense committed by a junior officer during the senior's absence, and while such junior was in command (30-Sup. 1433) (40-462 [1]).

6a. The power to administer disciplinary punishment under this Article is not restricted to the accused's immediate commander. A superior may reserve to himself the disposition of a given case (40-462 [1]). A forfeiture of pay lawfully imposed upon an officer under this Article cannot be "revoked" after it has been collected (45-237).

6b. Disciplinary powers under this Article are not limited to permanently assigned commanding officers, but may be exercised by temporary commanders (42-24).

6c. Subject to existing regulations the Commanding General of the Military District of Washington is authorized to impose disciplinary punishment under this Article upon all military personnel of inferior rank who are under his general court-martial jurisdiction. Chiefs of the various arms and services may exercise concurrent jurisdiction under this Article with respect to military personnel on duty in their respective offices (43-144).

6d. An Army officer in command of Army personnel assigned to a naval vessel may impose punishment under this Article upon such personnel (44-226).

#### IV. PUNISHMENTS

7. The punishments described in this Article are not exclusive of all others, but any punishment not mentioned must be similar in nature to those named (30-1434) (40-462 [4]).

7a. Kitchen police is military duty in a broad sense, but it is in the nature of fatigue duty, and as such it may be imposed as a punishment under this Article (42-165).

8. The following punishments are not authorized: Detention of pay (30-1434) (40-462 [4]); contribution of money to the company fund (12-584; 30-1434) (40-462 [4]); reduction in grade (30-1259) (40-255 [2]). Hard labor or extra fatigue should not be imposed upon noncommissioned officers, or persons of such relative or assimilated rank. Punishments which would tend to degrade the rank of persons upon whom they are imposed are not permissible (M.C.M. 119b).

8a. An order to "take a hike" imposed as a punishment, is illegal. Military duties may not be degraded by their use as forms of punishment under this Article (44-102).



9. There is no provision of law permitting any authority to rescind, vacate or disturb a legal order imposing a forfeiture under this Article after the forfeiture has been executed (46-341). Article 51 (Mitigation, Remission and Suspension of Sentences) applies only to an unexecuted portion of a punishment.

10. A general regulation restricting all soldiers who are undergoing company punishment, or who recently have been tried by court-martial, to the limits of the post is unauthorized because it has the effect of adding to the punishment awarded (30-1434) (40-p. 977).

11. Punishments inflicted merely at the will of military commanders are forbidden, *e.g.*, a reviewing authority may not disapprove an acquittal and order the accused to be confined or otherwise punished (12-585).

11a. A commanding officer, who coerced men of his organization who committed minor offenses into signing false "statements of charges" resulting in deductions from their pay, because he considered it the best method of maintaining discipline instead of using company punishment or regular court-martial procedure, was tried and convicted of a violation of Article 95 (Conduct Unbecoming) (43-342).

12. Post commanders are authorized to regulate traffic on posts under their command, and for a violation of such traffic regulations a soldier may be restricted from operating an automobile on the post for a definite or indefinite length of time, and such action does not constitute disciplinary punishment under this Article (30-1518) (40-422 [6]).

13. Upon prosecution for refusal to obey an order to do something imposed as a punishment under Article 104, it will be presumed, in the absence of evidence to the contrary, that the punishment was lawfully imposed (30-Sup. 1518) (40-422 [6]).

## V. APPEALS

14. Any failure to comply with regulations will not invalidate a punishment imposed under this Article except to the extent required by a clear and affirmative showing of injury to a substantial right, not expressly or impliedly waived by the person upon whom the punishment was imposed (M.C.M. 118).

15. One who fails to demand trial by court-martial when informed that it is proposed to punish him under this Article for a specific offense unless trial is demanded, is precluded from denying his guilt upon appeal from the punishment adjudged. The appeal is limited to cases where the punishment is deemed unjust or disproportionate to the offense, and the appeal may be entertained on that ground only (44-424).

## VI. SUBSEQUENT TRIAL

16. An unauthorized punishment imposed under this Article, being a nullity, does not bar subsequent trial by court-martial for the same offense (30-1259, 1433) (40-462 [2]) (44-192).

17. Authorized disciplinary action imposed and accepted under this Article is a bar to subsequent trial for the same offense, but it is not a bar to trial for a separate and distinct crime or offense growing out of the same act or omission (30-1258) (40-462 [3]) (42-24) (44-292). See M.C.M. 69c, 79.

17a. Disciplinary punishments under this Article are not "previous convictions by court-martial" within the meaning of M.C.M. 79c. Such punishments may be shown by the accused in mitigation of punishment by court-martial when they were imposed for an offense connected with the offense for which he is on trial (43-183, 184) (M.C.M. 79e).

18. A letter of admonition warning the accused that a repetition of certain conduct would result in disciplinary action, not intended as a reprimand or other punishment under this Article, does not bar subsequent trial for the original offense which caused the admonition to be given (30-1258) (40-462 [3]). See also Article 40, Annotation, Sec. III.

\* \* \* \*

*ARTICLE 105. INJURIES TO PROPERTY; REDRESS OF. Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.*

*Where the offenders cannot be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment*

*at the time the damages complained of were inflicted as determined by the approved findings of the board. (See Art. 89 and M.C.M. 176).*

### ANNOTATION

|   | Pars. |
|---|-------|
| I. IN GENERAL .....   | 1-8   |
| II. CLAIMS AND CLAIMANTS .....  | 9-11  |
| III. DAMAGES .....  | 12    |
| IV. PRO RATA ASSESSMENT .....   | 13-14 |
| V. BOARD'S AWARD, AS APPROVED BY THE<br>COMMANDING OFFICER, CONCLUSIVE ....   | 15-18 |
| VI. PRIORITY .....  | 19    |
| VII. ASSESSMENT NOT COLLECTED, OFFICER RE-<br>SPONSIBLE THEREFOR LIABLE ..... | 20    |
| VIII. COLLECTION IN SUBSEQUENT ENLISTMENT                                     | 21-22 |

### I. IN GENERAL

1. The combined function of this Article and Article 89 is to protect individuals from disorderly and riotous acts of military personnel. Article 105 is restricted in application to claims for the wrongful taking of, or injury to, private property, caused by acts involving depredation, willful misconduct, or such reckless disregard of property rights as to carry an implication of guilty intent. Damage caused by a simple act of negligence does not fall within its purview (30-624, 807, 808) (40-463 [2]). Contributory negligence by claimant will bar recovery under this Article (40-Sup. 463 [2a]) (42-26) (43-67, 196, 240). The taking of property by trick, device or deceit, unaccompanied by an element of force, is not a "depredation" within the purview of that term as here used (M.C.M. 176c).

1a. Claims arising in foreign countries, which otherwise might fall under this Article, are now required to be settled by the Claims Commissions under the Foreign Claims Act of April 22, 1943 (M.L.U.S. Sup. 708c).

2. The Article is applicable only against persons subject to military law. It cannot be applied against civilian employees of the War Department (30-781), nor against an officer for damage caused by members of his family when the officer himself was not involved (30-627) (40-p. 902). This Article cannot be invoked against a soldier who was insane when the damage was done (45-186).

3. Action under this Article, in connection with Article 89, is mandatory upon complaint being made (30-629). When a commanding officer delayed for nearly two years to act upon a complaint of a property owner as to depredations committed by soldiers, it was held that unless the officer could show that he had not been negli-

gent in the matter, he should be tried or required to settle the claim himself (30-631) (40-447).

4. In proceedings under this Article the issues are to be determined by a preponderance of evidence, and not beyond a reasonable doubt (30-633) (40-463 [4]).

5. The liability under this Article is not affected by the fact that the offender may be criminally liable; it is also independent of any judgment of a court-martial, and a court-martial cannot be substituted for the board of officers (12-132).

6. The stoppage of pay is to cover damage only. The stoppage of an additional amount as punishment is not authorized (12-584).

7. A board of officers appointed by a post commander to investigate a motor vehicle accident which occurred on the post with a view, merely, of determining facts to enable the post commander to fix responsibility for damage to government property and take appropriate action respecting the operation of motor vehicles on the post, is not authorized to determine the personal responsibility between individuals involved in the accident (30-Sup. 419 a) (40-p. 926).

8. A board convened under this Article is authorized to examine witnesses under oath, and false testimony upon a material matter given under oath before such board is statutory perjury punishable under (General) Article 96 (30-Sup. 1582) (40-451 [52]) (See Art. 93. Annotation, VIII, 81).

## II. CLAIMS AND CLAIMANTS

9. Claims for damages to private property caused by soldiers have been held to be cognizable under this Article in the following cases: Theft of an automobile (30-625) (40-463 [3]); raiding an orchard (30-625) (40-463 [3]); claim of prisoner for loss of clothing turned over to a guard for safekeeping (30-625). The following have been held as not so cognizable: Claim of a bank for money obtained by false pretenses unaccompanied by any force, violence, or disorderly conduct (30-625) (40-463 [3]); claims of patients in a hospital for money lost through embezzlement by the custodian of "patients' funds" (30-Sup. 625) (40-463 [3]); claim for loss of a registered letter through negligence of commanding officer to establish a proper system of handling mail (30-624) (40-463 [2]).

ga. Soldiers who were sent out to get trees and shrubbery on the reservation to decorate the company areas negligently disregarded boundaries and took trees and shrubbery and destroyed a barn on private property. Held that the resulting claim for damages as to the trees and shrubbery should be paid by the government, but that the destruction of the barn was a wanton depredation for which the guilty persons were responsible under Article 105 (42-366).

9b. A claim for damage caused by reckless driving of a government vehicle by a soldier who had taken it without permission, and was intoxicated at the time, is within the scope of this Article (42-366).

9c. Claims based on embezzlement, fraud, forgery, or deceit, unaccompanied by riotous, violent, or disorderly conduct, are not within the scope of this Article (42-366) (43-240).

10. This Article may be invoked by military personnel as well as civilians, in proper cases, to recover for loss of, or damage to, their private property by soldiers (30-628) (40-463 [1]). When, at the suggestion of a battery commander, a member of his battery entrusted a sum of money to him for safekeeping and, through the fault of the battery commander, the money was stolen, the battery commander was held liable for the loss. A soldier is liable to another soldier for damages to his private automobile caused by the recklessness of the first soldier (40-463 [1]).

11. An insurance company which has reimbursed the owner for the damages to his property is not subrogated to the owner's rights under this Article (30-634) (40-463 [9]).

### III. DAMAGES

12. Direct damages only are to be considered. Indirect or consequential damages should not be included (30-626) (40-463 [8]). But an item for the loss of use of a vehicle which is used for business purposes, pending repair of damage caused by the misconduct of the soldier involved, may be included (44-103).

### IV. PRO RATA ASSESSMENT

13. This Article formerly contained no provision for a *pro rata* assessment against an entire command, but it was held in several cases that such action was proper where the entire command, or substantially all, were present and implicated but the particular offenders could not be identified. Men who were known to have been absent were exempted (12-132).

14. Under the present Article, if the individual offenders cannot be ascertained, stoppage may be made against all who were present with the command at the time; and if neither the individuals nor the particular unit to which they belong can be identified, it is proper to assess damages *pro rata* among the various units in a detachment, and for this purpose an entire camp may be considered as a "detachment". It has also been held, in such case, that the damages may be collected from the funds of the post exchange in which the entire command is interested (30-629) (40-463 [6]); but before the post exchange can be assessed for this purpose there must be a positive finding that soldiers "of the post" committed the depredation, and

that neither the individuals nor the units to which they belong can be ascertained (30-1717) (40-463 [6]).

#### V. BOARD'S AWARD, AS APPROVED BY THE COMMANDING OFFICER, CONCLUSIVE

15. The recommendations of the board, when duly approved, are final. The mere fact that one or the other party feels aggrieved is not sufficient reason for a reexamination or the appointment of a new board (30-632) (40-463 [5]). The Comptroller General holds that if the board was properly appointed, acted within its jurisdiction, and its findings were approved by the commanding officer, the accounting officers of the government will not question the regularity of its proceedings (42-165). When the claim is not within the scope of the Article the board's report and recommendation thereon is a nullity (43-240). Even the Secretary of War cannot authorize the remission and cancellations of any indebtedness determined under this Article (45-58).

16. Approval of the commanding officer (who appointed the board) is essential. If he does not approve, superior authority cannot make the award effectual. The commanding officer cannot increase the award (30-633) (40-463 [4]). If for any reason it subsequently develops that his original action was wrong, the commanding officer may change his decision either for or against the soldier involved, so long as he is in command of the unit concerned, regardless of whether the soldier has been transferred. A successor in command of the unit may not change the original finding except upon newly discovered evidence or obvious error of law or fact appearing on the record, and this also, regardless of whether the soldier has been transferred. But the commanding officer of a unit to which the soldier has been transferred is not authorized, under any circumstances, to disturb the original decision. If the original unit in which the action was taken has been disbanded, no further action can be had under this Article (45-58).

17. If the claimant refused to accept the award of the board the military authorities can afford him no further relief, and he is left to pursue such remedy as he may have against the individuals concerned under the civil law (30-636) (40-463 [5]).

18. Stoppage against a soldier's pay to satisfy an assessment against him under this Article is mandatory, and such stoppage, once properly imposed, may not be remitted or reduced in amount unless the claimant assents (30-635) (40-463 [5]). It is assessable against pay only, and cannot exceed, with other authorized deductions, two-thirds of the soldier's pay per month (40-Sup. 463).

## THE ARTICLES OF WAR

## VI. PRIORITY

19. As between a stoppage under this Article and a sentence of forfeiture by court-martial, the one which is first imposed takes preference (12-132).

## VII. ASSESSMENT NOT COLLECTED, OFFICER RESPONSIBLE THEREFOR LIABLE

20. An officer who is responsible for failure to collect an assessment against a soldier's pay under this Article before the soldier is discharged from the service, may be held responsible for the amount of the damage (30-399) (40-447). Under the language of Article 89 it would seem that such officer's responsibility would be limited to the amount which could have been collected.

## VIII. COLLECTION IN SUBSEQUENT ENLISTMENT

21. The discharge of a soldier from the service before collection of an assessment against him under this Article does not relieve him from legal liability in the premises, and upon his subsequent re-enlistment, the balance may be collected (30-630) (40-463 [5] [7]).

22. This Article cannot be invoked to collect a claim against an officer who is no longer in the service (42-27) (43-347).

See also Article 89 (Wrongs Redressed).

\* \* \* \*

*ARTICLE 106. ARREST OF DESERTERS BY CIVIL OFFICIALS. It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States. (See M.C.M. 22, 23).*

## ANNOTATION

1. If a civil official has reasonable grounds to believe that a person is a deserter, he has power to arrest him without an order or request from military authorities; and though not specifically authorized by this Article, any civilian may arrest a deserter if he acts pursuant to an order or request from a military officer (12-401, 402, 405; 30-188, 1244) (40-153 [1], 464).

2. In accomplishing the arrest of a deserter such force may be used as is necessary to overcome resistance, but no more, and such force-

able entry of a dwelling as is authorized in making arrests in the state in which the arrest is made would probably be justified (12-400).

3. The civil officer making the arrest may deliver the prisoner to the military authorities at any designated place regardless of state or other jurisdictional lines (12-401; 30-1244) (40-464).

4. If a writ of *habeas corpus* is issued by a state court while the deserter is in the custody of a state officer, the officer should make a return justifying his custody by showing that the party is held by authority of the United States (12-401).

5. A soldier who has been extradited from a foreign country solely upon a charge of theft, or other specified offense, cannot be arrested and held for desertion. The principle that when a person is extradited for a certain offense he is exempt from prosecution for any other crime is applicable although such other crime is a military one (12-401).

6. From time to time there has been provision in the War Department appropriation acts for the payment of "rewards" for the apprehension of deserters. The decisions as to when, to whom, and under what circumstances such rewards are payable are not cited here in detail because such questions depend upon the particular language of the current act. (See 12-402 to 413) (40-153 [1]).

7. A soldier, while in a status of absent without leave, was apprehended by civil authority at the request of military authority. He was subsequently convicted of desertion. Held that the apprehending officer was entitled to be paid a reward for such apprehension (42-151). A civil policeman upon request of military authority arrested two soldiers who were absent without leave and turned them over to the military authorities. The commanding officer thought it probable that they had quit their posts to avoid hazardous duty within the meaning of Article 28. Held that the policeman's actual expenses (within limits provided by law and regulations) should be paid. While the civil authorities should not, ordinarily, be requested to apprehend soldiers who are merely absent without leave, in this case it was appropriate to do so in view of the possibility that they were guilty of desertion under Article 28 (42-151, 152).

\* \* \* \*

*ARTICLE 107. SOLDIERS TO MAKE GOOD TIME LOST. Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through*



*disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.*

### ANNOTATION

|  | Pars.  |
|--|--------|
| I. IN GENERAL .....  | 1-5    |
| II. TIME LOST IN DESERTION .....   | 6-7    |
| III. TIME LOST WHILE ABSENT WITHOUT LEAVE .....                          | 8      |
| IV. TIME LOST IN MILITARY CONFINEMENT ....                               | 9-11   |
| V. TIME LOST IN CIVIL CONFINEMENT .....                                  | 12-13  |
| VI. TIME LOST THROUGH DISABILITY DUE TO MISCONDUCT—"LINE OF DUTY" CASES: |        |
| IN GENERAL .....   | 14-21  |
| ABSENT WITHOUT LEAVE .....   | 22-24  |
| AUTOMOBILE ACCIDENTS .....   | 25-26d |
| AVIATION ACCIDENTS .....   | 27     |
| DRUNKENNESS .....  | 28     |
| IMPROPER RELATIONS WITH WOMEN .....                                      | 29-34  |
| PRISONERS .....  | 35     |
| SCUFFLING, FIGHTING, ETC. ....   | 36     |
| SPORTS, RECREATION, ETC. ....  | 37     |
| SUICIDE—SELF-INJURY .....  | 38-39  |
| VIOLATING CIVIL LAW .....  | 40-41  |

### I. IN GENERAL

1. The liability to make good time lost imposed by this Article may be waived by the government, and it is so waived when a deserter is discharged by competent authority, or sentence of court-martial, without being held to make good the time lost in desertion. But when a sentence does not include discharge the liability holds (12-130, 611; 30-640, 642) (40-465 [6]). It is also waived when a soldier is honorably discharged to accept a commission; but in such case his enlisted service record cannot be changed to "restore" the time lost because such records may not legally be changed where the existing entries conform to the facts. Furthermore, in this case the lost time may not be counted for pay purposes (49-93).

2. The liability is automatic and should not be included in the punishment imposed by court-martial (12-130, 547).

3. If a conviction of desertion or absence without leave is disapproved, or the accused is acquitted, the liability to make up the

time lost is wiped out (12-130), except that in case of sentences disapproved because they are inadequate, the accused may still be required to make up the time lost (30-639) (40-465) [2]. (See M.C.M. 87b, next to last par.).

4. This Article was formerly held not to apply to soldiers enlisted or drafted "for the duration" (30-639, 641); but it is applicable to National Guardsmen in Federal service under the public resolution of August 27, 1940, and to persons inducted under the Selective Training and Service Act of 1940 (40-Sup. 465) (M. L. U. S., Sup. 2220 [1-4] 2225 [1-16]).

5. The so-called "30-day month law" (M. L. U. S. 1483) which deals with the computation of time for pay purposes, is not applicable in computing time lost under Article 107, and actual time lost only is required to be made up. Thus 28 days will make up for absence during the whole month of February (30-638; except in leap year when it would take 29) (40-465 [5]).

## II. TIME LOST IN DESERTION

6. The liability to make up the time lost continues although prosecution may be barred by the statute of limitations (12-131; 30-639) (40-465 [2]); and when a deserter is restored to duty without trial he may be required to make up the time he lost in desertion (12-129).

6a. The Comptroller General does not concur in the view that when prosecution for desertion is barred by the statute of limitations (Article 39) deserters, upon their return to military control, may be held to make up time lost in desertion, and will not question their right to pay and allowances when returned to duty and actually serving as soldiers (42-27).

7. The enforcement of this Article is postponed until after any sentence to confinement which may have been imposed is executed (the two cannot run concurrently), and a deserter may still be held to make up lost time after the expiration of his sentence even though, in the meantime, his term of enlistment has expired (12-130).

## III. TIME LOST WHILE ABSENT WITHOUT LEAVE

8. The status of absence without leave, for pay purposes, terminates when the absentee is returned to a *duty status* either in his own, or some other organization. It does not necessarily coincide with his return to *military control* (30-1857, 1858, Sup. 35 a) (40-pp. 887, 888, 995). It would seem that, in general, the computation of time to be made up under this Article would coincide with that for purposes of pay.

## IV. TIME LOST IN MILITARY CONFINEMENT

9. The liability to make up time lost in confinement is not limited to cases of absence without leave and desertion, but extends to all cases of misconduct of which a soldier is convicted (30-641) (40-465 [3]).\*

10. Time spent in "arrest" is not confinement within the meaning of this Article; and confinement terminated by restoration to duty without trial does not have to be made up (30-Sup. 641) (40-465 [3]).

11. If a soldier, through error in computing his good-conduct time, is held in confinement beyond the date when he should have been released, he is entitled to credit for such overtime in confinement on his current enlistment (30-641) (40-250 [2]).

## V. TIME LOST IN CIVIL CONFINEMENT

12. Generally speaking, absence in the hands of civil authorities is absence without leave (12-611), and a soldier who, through his own misconduct, is arrested and detained by the civil authorities for more than one day, must make up the time so lost even though he is released by the civil authorities without trial (30-641) (40-465 [3]).

13. If a soldier is released on bail by the civil authorities while awaiting trial, and returns to his station, and is not confined by the military authorities, he reverts to a duty status (12-266); but if he is turned over to the military authorities for confinement pending the disposition of his case by the civil court, his status with respect to his availability for military duty is the same as though he had been held in confinement by the civil authorities (30-1864).

## VI. TIME LOST THROUGH DISABILITY DUE TO MISCONDUCT—"LINE OF DUTY" CASES

14. The Article imposes liability to make up time lost "through disease or injury the result of his own misconduct". It will be seen by the citations given below that if misconduct is the proximate (moving or direct) cause of a disability, such disability must, of necessity, be held to have been incurred "not in line of duty". But the converse of this proposition is not always true, and it does not necessarily follow that a disability incurred "not in line of duty" is the result of misconduct. There are numerous decisions upon the question here involved (30-420 to 475) (40-pp. 952-974) from which the general principles outlined below may be deduced.

15. In general, disability or death incurred during a soldier's period of military service is "in line of duty" if, at the time when it was incurred, he was submitting to all the laws and regulations of

\* When the confinement is for more than one day, the first day of confinement is chargeable as time lost, but the day of release from confinement is not to be so charged (49-14).

the military service and was not guilty of material misconduct (30-420) (40-p. 952). A soldier is entitled to the benefit of the presumption that his disability or death was incurred in line of duty and not as the result of his own misconduct until facts sufficient to overcome such presumption are presented (44-408).

16. A soldier may do any of the usual things incident to everyday life of men in general and not inconsistent with his military status, without taking himself outside the "line of duty"; but if he steps outside the line of military duty, although with permission, to engage in some employment or gratuitous service, not incident to his personal every-day affairs or his military status, then he assumes the responsibility for any disability he may incur as an incident to such outside employment or service (30-426, Sup. 421) (40-p. 955).

16a. An injury received by a soldier while "on pass" working in a cannery by authority of a War Department Circular issued for the purpose of relieving labor shortage in the food processing industry, was held to be in line of duty. Under the circumstances the employment in which he was engaged did not take him out of a line of duty status (43-458). Circular 458, W. D. 2 December 1944 provides that: "A militarized person who engages in outside activities (as distinguished from everyday affairs), not incident to his military status and not essential to the furtherance of national interest and military effort, assumes responsibility for any disease or injury to himself resulting from such activities, unless they are of a class authorized and encouraged by the War Department" (45-43).

17. Mere carelessness or negligence alone is not misconduct; it must be culpable negligence or gross carelessness to amount to misconduct (30-422, 429, 430, 433, 436, 439, Sup. 421 a, 435) (44-130, 177, 407) (45-213). Reckless conduct is misconduct (30-435) (40-p. 953). An injury incurred by a soldier by the accidental discharge of his rifle, no misconduct being involved, is in line of duty (44-177).

17a. An injury suffered by a soldier on furlough in attempting to alight from a moving freight train from a position between two freight cars was held to be the result of his own misconduct because he had voluntarily placed himself in a position that was inherently dangerous. This holding was not based upon any conclusion that his unauthorized boarding, alighting from, or riding the train was, in itself, sufficient to take him out of the line of duty, but on the ground that, although he may have believed he could execute his plan without accident, under the circumstances his conduct was reckless, wanton, and in utter disregard of the probable consequences (44-369).

18. A finding that a disability is due to misconduct is proper only when, by a fair balance of evidence, it is established that such misconduct was the proximate cause of the disability. When misconduct

is merely a contributory, and not the direct cause, the disability cannot be said to be the result of misconduct (30-Sup. 421 *a*, 435) (40-p. 953) (44-217).

19. An injury incurred as a direct result of a violation of orders is to be regarded as caused by misconduct; but if the act done in violation of orders was not the proximate cause of the injury, it should not be considered as the result of misconduct (30-431, 435, 441) (44-129, 130). A mere warning not to do a thing is not alone sufficient upon which to base a finding of misconduct if injury results therefrom (30-430, 433) (40-pp. 953-970). In a recent decision (Sept. 1945) it was held that the violation of a prescribed safety regulation is to be considered merely as one factor to be weighed with other circumstances, and that such violation, standing alone, without any contributory facts showing gross negligence or a wilful disregard for safety, is not sufficient to remove an injury or death from a "line of duty" status; and the death of a soldier who was drowned while swimming in the ocean in violation of orders, was considered as in line of duty (45-413).

19a. A soldier, who had been arrested by a military policeman, struck the policeman knocking him down, and persisted in his attack after being warned by the policeman to stop, whereupon the policeman shot and killed him. Held that the soldier's death was due to his own misconduct and not in line of duty (42-90).

20. The administrative procedure for determining whether absence from duty is due to misconduct is provided for in Army Regulations. If the soldier does not avail himself, at the time, of his right to appeal provided by said regulations, he cannot afterwards question the diagnosis or finding; also when the ultimate decision was "in line of duty", and so entered upon the record by competent authority, such decision is final. A tentative diagnosis "in line of duty" upon admission of a soldier to hospital is not necessarily final, but may be changed to "not in line of duty" to conform to a correct and final diagnosis. The latter is final and covers the entire period of hospitalization if the soldier had notice and took no appeal therefrom (30-1859, Sup. 1859) (40-1442 [3], 465 [6]). However, when a line-of-duty case reaches the War Department the whole record may be reviewed and the findings of the board and immediate reviewing authority may be reversed (43-261) (48-105). Duly authenticated copies of the statements of witnesses accompanying the report of investigation are competent upon which to base a final determination, but it is preferable to have original signed statements (43-457). And the commanding general of a Service Command has power to disapprove findings that an injury was not in line of duty and due to an officer's own misconduct and substitute findings of his own that the injury was in line of duty and not due to the officer's own misconduct (44-128).

21. If a soldier in hospital "in line of duty" acquires a disease "not in line of duty" he should be carried as "not in line of duty" only from and after the date when his retention in hospital is no longer necessary by reason of the innocent cause, but is necessary by reason of the disease caused by his misconduct (30-Sup. 1861) (40-1442 [2]). When a soldier in hospital with a fracture in line of duty, went absent without leave, and while so absent incurred a refracture in the same place, the refracture was held not in line of duty (30-Sup. 464) (40-p. 971).

*Absent Without Leave*

22. A disability incurred while absent without leave is generally not in line of duty, but it is not to be regarded as due to misconduct merely because of the absent-without-leave status unless the absence itself was the proximate cause, as when the injury (frozen feet) was due to exposure while so absent (30-465). But an accidental injury incurred through no fault or misconduct of the injured man, though not in line of duty, is not due to misconduct (30-466); and in the absence of proof of misconduct the doubt should be resolved in favor of the injured man (30-Sup. 464) (40-pp. 957, 971-973).

23. An injury incurred by a soldier while absent without leave may, under special circumstances, be in line of duty, as where a sergeant who, while absent without leave with a party of soldiers, in attempting to quell an affray between some members of the party and civilians (as was his duty under Article 68), was shot by a civilian, it was held that his injury was incurred in line of duty and not the result of his own misconduct (30-467) (40-p. 972). But when a soldier driver of a Government truck deviated from his authorized route and had an accident causing the burning of the truck, and after freeing himself, without injury, from the burning wreckage, went back to free another soldier who was caught in the overturned burning truck, and sustained severe injuries in so doing, it was held that such injuries were not incurred in line of duty because the soldier's act in going back to save the other man however heroic and commendable, could not be considered as the performance of a military duty, under the circumstances. Held: Not in line of duty and not the result of the soldier's own misconduct (44-505).

24. From the decisions cited under this Article, and others noted under Article 61 (AWOL), it seems inferable that time lost, after a soldier's return from an absence without leave, due to a disease contracted while so absent, is required to be made good; but not so if the disease was incurred in line of duty before he went absent without leave (30-468, 469, 470) (40-972).

*Automobile Accidents*

25. Driving an automobile when intoxicated or incapacitated by

lack of sleep is gross negligence amounting to misconduct. However in the case of an officer who was injured while proceeding to his home under orders, and the proximate cause of the accident was his drowsiness, caused by unusual fatigue due to official duties and the warmth of a closed car necessitated by weather conditions, it was held that his injury was incurred in line of duty and not as the result of misconduct (30-Sup. 435) (40-p. 961) (44-89).

26. Injury incurred in an automobile accident while on "pass", the accident being caused by mechanical defects in the car which the soldier was driving, no misconduct being shown, is in line of duty and not due to misconduct (30-Sup. 435) (40-p. 962).

26a. An officer who was authorized to use a Government car permitted a civilian (a woman) to drive it, resulting in an accident and injury to the officer due to lack of skill of the driver. His injury was held to be due to his own misconduct (43-457).

26b. An officer who was using a Government car in personal business in violation of orders met with an accident and was injured through no gross fault of his own, although he had been drinking but was not intoxicated. Held, that his injury was incurred not in line of duty and not as a result of his own misconduct (43-457) (44-217).

26c. A soldier, stationed at Camp Lee, Va., was given a pass to visit Petersburg, Va. He went to Springfield, Mass., and on his way back, when 70 miles from his station, and two hours before his pass would have expired, was killed in an accident to an automobile in which he was riding. Held, due to his flagrant violation of the terms of his pass, that his death was not in line of duty, but that his misconduct was not the proximate cause (43-487).

26d. A lieutenant and his captain were injured in an automobile accident. The car was being driven by the lieutenant on the captain's responsibility. The proximate cause of the accident was excessive speed. Held: The injuries of both were not in line of duty and were the result of their own misconduct. The injury of another lieutenant who was riding in the car, but had no responsibility for its operation, was held in line of duty (44-89).

#### *Aviation Accidents*

27. Following the principles noted in paragraphs 14-21 above, it has been held that an air corps officer who was accidentally killed while flying a private air craft for hire with authority of the War Department, no misconduct on his part being involved, died "not in line of duty but not the result of his own misconduct" (30-426) (40-p. 955). This principle would be applicable in case of injury only. But an air corps officer, injured while "stunting" at less than 1500

feet altitude, in violation of regulations, was held to have been injured not in line of duty and as the result of his own misconduct (30-427) (40-p. 955) (44-129).

#### *Drunkenness*

28. If drunkenness is the proximate cause of an injury, such injury will be regarded as due to misconduct, but not necessarily so if there was an intervening cause of the injury for which the soldier was not responsible (30-423, 435, 437, 442, 443, 448, 453, Sup. 444a, 448) (40-pp. 954-955). Two cases will serve to illustrate: One, an officer, who had "had several drinks," was shot while pounding on the door of a house to whose owner he was entirely unknown, was held to have incurred the injury as a result of his own misconduct (30-Sup. 444a) (40-p. 954). Two, a soldier who had been drinking, while in a saloon, not "off limits," was, without misconduct or provocation on his part, attacked and injured by unknown parties. It was held, that as the proximate cause of the injury was an unprovoked attack, not due to the soldier's misconduct, it could not be considered otherwise than "in line of duty" (30-Sup. 448) (40-p. 955).

#### *Improper relations with women*

29. Injury incurred as the direct result of improper relations with a woman (such as an assault by the husband on account of such relations) is due to misconduct (30-445, 447) (40-p. 954).

30. Venereal disease, in view of the small number of cases innocently contracted, is generally held to be due to misconduct (30-454) (40-p. 969).

31. If a soldier contracts a venereal disease while he is a patient in hospital for another disease innocently acquired, he may be required to make up for any further time in hospital caused by the venereal disease. But having been already "absent from a duty status" when he acquired the venereal disease, his "absence from duty" cannot be said to be caused by the venereal disease while he is a patient on account of the innocent cause (30-1861, Sup. 1861) (40-1442 [2]).

32. Time lost by reason of a venereal disease incurred prior to enlistment must be made good (30-640) (40-465 [4]).

33. Soldiers held in hospital for the purpose of determining whether they have a venereal disease are not required to make up the time thus lost when the test does not disclose such disease (30-1859) (40-1442 [2]).

34. A soldier in quarantine under suspicion of having a venereal disease is not required to make up time thus lost when the test does not disclose such disease (30-1859) (40-1442 [2]).



*Prisoners*

35. The fact that a soldier is a prisoner at the time of incurring an injury would not, of itself, place him out of the line of duty (30-471) (40-p. 973); but an injury incurred in attempting to escape from arrest or confinement is directly due to misconduct (30-472) (40-p. 974).

*Scuffling, fighting, etc.*

36. In general, injuries incurred as the result of a "scuffle" or altercation, even though entirely friendly, if such conduct amounts to a "disorder" of the character recognized by Article 96 as "to the prejudice of good order and military discipline," will be regarded as due to misconduct; but, an injury incurred in an altercation in which the injured party was not the aggressor will not be so regarded (30-444, 446) (40-pp. 953, 954). The death of a soldier in an affray in which he was the aggressor should be held not in line of duty and due to his own misconduct, regardless of whether the action of his assailant was, or was not, justified (44-128, 129).

*Sports, recreation, etc.*

37. An injury incurred while engaged in normal and proper recreation, and in sports or contests under control or supervision of the military authorities, is not due to misconduct (30-449, 450, 451) (40-pp. 966, 967). An injury incurred by an officer in a rodeo competition in which he was participating with permission of his commanding officer, was held not in line of duty and not the result of his own misconduct (44-89).

*Suicide—self-injury*

38. In the absence of proof that poison found in the stomach of a deceased soldier was knowingly self-administered, the evidence not being inconsistent with accident or homicide, the presumption of law against suicide is not overthrown, and the death should be held as in line of duty (30-Sup. 459a) (40-p. 968).

38a. There is a strong presumption that a sane person will not commit suicide. The mere possibility that death was by suicide is not sufficient to warrant a finding of death by suicide (42-143). But suicide alone is not sufficient upon which to base a finding of mental unsoundness. There must be some further proof, but it need not be clear, positive, or convincing. Ordinarily very little definite proof of actual mental unsoundness, in addition to actual or attempted self-destruction, is necessary to justify a finding of mental irresponsibility (44-131).

39. The drinking of intoxicating liquor is not, *per se*, misconduct. Therefore death (or disability) caused by poison liquor cannot be

held due to misconduct unless it be shown that the liquor was willfully taken by the soldier with intent to injure himself (30-Sup. 463a) (40-p. 971).

*Violating civil law*

40. Injury suffered by a soldier while he is violating a civil law (e. g. trespassing upon a railroad right of way) is not necessarily due to misconduct (30-443, Sup. 443) (40-p. 965).

41. Disease or injury innocently incurred while in the hands of civil authorities, but not absent without leave from military control, would not be held to be due to misconduct (30-473, 474) (40-p. 974).

\* \* \*

*ARTICLE 108. SOLDIERS—SEPARATION FROM THE SERVICE. No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial (As amended by S.S.A. '48, effective Feb. 1, 1949).*

The Service Men's Readjustment Act of 1944 (M.L.U.S. Sup. 1164 [2] [6]) contains the following provisions affecting this Article:

Section 104. No person shall be discharged or released from active duty in the armed forces until his certificate of discharge or release from active duty and final pay, or a substantial portion thereof, are ready for delivery to him or to his next of kin or legal representative; and no person shall be discharged or released from active service on account of disability until and unless he has executed a claim for compensation, pension, or hospitalization, to be filed with the Veterans' Administration or has signed a statement that he has had explained to him the right to file such claim: *Provided*, That this section shall not preclude immediate transfer to a veterans' facility for necessary hospital care, nor preclude the discharge of any person who refuses to sign such claim or statement: *And provided further*, That refusal or failure to file a claim shall be without prejudice to any right the veteran may subsequently assert . . .

Sec. 301. The Secretary of War and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the War and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion, or upon the request of a former officer or enlisted man or woman, or if deceased, by the

surviving spouse, next of kin, or legal representative, the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court-martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel; *Provided*, That the term "counsel" as used in this section shall be construed to include, among others, accredited representatives of the veterans' organizations recognized by the Veterans' Administration. . . . Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court-martial, to change, correct or modify any discharge or dismissal, and to issue a new discharge in accordance with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are hereby amended to authorize the Secretary of War and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of War or the Secretary of the Navy, respectively: *Provided*, That no request for review by such board of a discharge or dismissal under the provisions of this section shall be valid unless filed within fifteen years after such discharge or dismissal or within fifteen years after the effective date of this Act whichever be the later.

This Act was approved June 22, 1944.]

### ANNOTATION

|   | Pars.  |
|---|--------|
| I. IN GENERAL .....                       | 1-4    |
| II. HONORABLE DISCHARGE .....             | 5-11   |
| III. BAD CONDUCT DISCHARGE .....          | 12     |
| IV. DISHONORABLE DISCHARGE .....          | 13-19  |
| V. REASONS FOR DISCHARGE .....            | 20-26  |
| VI. DISCHARGE BY PURCHASE .....           | 27     |
| VII. DISCHARGE FOR DISABILITY .....       | 28-29  |
| VIII. DISCHARGE FOR FRAUDULENT ENLISTMENT | 30     |
| IX. REMARKS UPON DISCHARGE CERTIFICATE    | 31     |
| X. WHO MAY ORDER OR SIGN .....            | 32-34  |
| XI. EXECUTION OF DISCHARGE .....          | 35-47  |
| XII. CANNOT BE REVOKED EXCEPT FOR FRAUD   | 48-56  |
| XIII. LOST CERTIFICATE .....              | 57-57a |
| XIV. NATIONAL GUARD IN FEDERAL SERVICE .. | 58-60  |
| XV. RETIRED ENLISTED MEN .....            | 61-62  |

### I. IN GENERAL

1. There is no statute relating to the classification of discharges

from the military service. The matter rests with the executive branch of the Government, and the authority to determine the class of discharge to be given is incident to the authority to order the discharge, subject always to regulations (12-433, 461) and the Articles of War.

2. There are now five types of enlisted discharge: (1) honorable; (2) general; (3) undesirable; (4) bad conduct; and (5) dishonorable. The first three are issued through administrative procedure; (4) and (5) are punitive in nature, and may be issued only pursuant to a sentence of court-martial duly approved and promulgated by competent authority.

3. There may be a "constructive" discharge, as where a soldier was ordered to be discharged by a Federal court on *habeas corpus* on October 26, 1918, and pending an appeal by the government, was carried as "absent with leave" until August 9, 1919, when he was formally discharged, the appeal never having been perfected, it was held that the soldier was constructively discharged on October 26, 1918 (30-259) (40-p. 1005).

4. No soldier should be summarily discharged for a concrete offense susceptible of proof. He is entitled to a trial. And one whose conviction by court-martial has been disapproved on the merits, should not be summarily discharged principally on account of such offense (12-435, 436, 462, 463).

## II. HONORABLE DISCHARGE

5. An honorable discharge releases the soldier from amenability for all offenses charged against him during the term of enlistment to which it relates (except under Article 94, Frauds) and, therefore, does not relieve him from prosecution for a desertion from a prior enlistment from which he has not been discharged (12-462, 515; 30-272) (40-466 [6]).

6. An enlistment, terminated by an honorable discharge, is to be regarded as honorable throughout, notwithstanding any disciplinary action to which the soldier may have been subjected during that enlistment (12-434, 615, 618, 619; 30-272, 352). When a soldier who was convicted of desertion by an illegally constituted court, the proceedings being vacated and the soldier restored to duty and subsequently honorably discharged, it was held that the charge of desertion was thereby removed (30-Sup. 178) (40-466 [6]).

7. If a dishonorably discharged soldier serves honestly and faithfully in a subsequent enlistment he is entitled to an honorable discharge from such subsequent enlistment notwithstanding his former bad record (30-271) (40-p. 998).

8. When a sentence to confinement and dishonorable discharge is

remitted and the soldier is restored to duty and serves out the remainder of his enlistment honestly and faithfully, he is entitled to an honorable discharge (30-270) (40-407 [4]).

9. A soldier who has an honorable discharge from wartime service under an assumed name is entitled to a certificate in his true name covering such service, notwithstanding the fact that he has been dishonorably discharged from a subsequent enlistment, provided the false name was not used to cover a crime or avoid its consequences (30-254) (40-235).

10. A soldier discharged for a physical disability incurred prior to enlistment, the facts having been fully disclosed by him at the time of his enlistment, is entitled to an honorable discharge (30-263).

11. When a soldier was convicted of three minor offenses and sentenced to forfeiture and confinement, and prior to approval of the sentence the soldier was discharged for physical disability incurred in line of duty, not being in confinement at the time of his discharge, it was held that his separation from the service was under honorable conditions (30-264) (40-p. 1002).

### III. BAD CONDUCT DISCHARGE

(See M.C.M. 10, 15, 87b, 117c)

12. A bad conduct discharge may be adjudged by a general or special court-martial in any case in which a dishonorable, or bad conduct, discharge is authorized in the Table of Maximum Punishments (M.C.M. 117c). When a bad conduct discharge is adjudged by a special court-martial the sentence must be approved by an officer exercising general court-martial jurisdiction (see A.W. 47d) and the proceedings must be reviewed by the appellate agencies in the Judge Advocate General's Office (see A.W. 50e); and a complete record of the proceedings and testimony must be made and submitted to the reviewing authorities. Even when a bad conduct discharge is adjudged, the sentence of a special court-martial cannot include a forfeiture of more than two-thirds pay per month for six months, nor confinement for more than six months (see A.W. 13 and M.C.M. 15). This type of discharge is designed as a punishment for bad conduct as distinguished from serious civil or military offenses. It is deemed particularly appropriate for one who has been convicted, repeatedly, of minor offenses, and deserves punitive separation from the service (M.C.M. 87b). See also Articles 12 and 13.

### IV. DISHONORABLE DISCHARGE

(See M.C.M. 87b, 117)

13. A dishonorable discharge does not relate to any particular term of enlistment; it is a discharge from the service, imposed as

a punishment, and is a complete expulsion from the army and covers all unexpired enlistments. A dishonorably discharged soldier cannot be made amenable for any offense (except under Article 94, Frauds) committed in a prior enlistment, nor would a subsequent enlistment revive his amenability for such offenses (12-462, 515). The dishonorable discharge of a prisoner at the expiration of his term of confinement does not relieve him from being held to serve out a cumulative sentence of confinement adjudged prior to such discharge (12-841), but he cannot be held for the purpose of collecting a fine (12-612).

14. Dishonorable discharge can be authorized only by sentence of a general court-martial after trial and conviction and it must be expressly included in the sentence. It is not to be implied from a sentence to life imprisonment or any other punishment (40-402 [4]) (45-337). A sentence to "be dishonorably discharged at such date as may be fixed by the reviewing officer" is improper (12-561, 562). The language should be merely "dishonorably discharged from the service," without any attempt to fix the date either directly or indirectly. (See M.C.M. 117c for offenses for which authorized).

15. A sentence of "dismissal" is inappropriate in the case of an enlisted man or warrant officer, but if used it has the same effect as one of dishonorable discharge (43-10, 380).

16. The dishonorable discharge by sentence of an Army court-martial of a member of the Marine Corps, detached for service with the Army at the time, terminates a prior enlistment in the army from which he had deserted, but of which the court-martial had no knowledge (30-271) (40-p. 1005).

17. A dishonorable discharge is *prima facie* evidence that the soldier's service, during the enlistment in force at the time, has been not honest and faithful (30-271) (40-p. 1005).

18. A dishonorable discharge in time of peace does not entail any loss of civil or political rights, but does rescind all contingent rights and benefits conditioned upon honest and faithful service. A dishonorable discharge for desertion in time of war includes the forfeiture of all rights of citizenship, as well as eligibility to become a citizen, and renders the subject forever incapable of holding an office of trust or profit under the United States (30-271, 685, 686) (40-154 [1]) (M. L. U. S. 154). But see Art. 58; Anno., par. 72.

19. If a dishonorable discharge is not suspended, pay and allowances continue to accrue to the soldier's account until the date the discharge is executed, which does not mean that they are paid to the soldier. The balance, after payment of debts due the United States and individuals, whether incurred before or after the sentence, is turned over to the Soldiers' Home under the statute (M. L. U. S.

1126). When the dishonorable discharge is suspended pending confinement, pay and allowances cease to accrue on the date of the suspension (30-1875) (40-1126). No pay or allowances accrue while a soldier is serving in confinement under a suspended dishonorable discharge. If and when a dishonorable discharge is remitted, pay and allowances continue to accrue, and thereafter the soldier's forfeitures may not exceed, in rate, two-thirds of his pay per month, or in amount, two-thirds of his pay for six months (30-1874) (40-402 [10]). A sentence to total forfeitures is effective on the date of the order promulgating the approved sentence (M.C.M. 117c).

## V. REASONS FOR DISCHARGE

### *Minority*

20. Discharge on account of minority can be obtained only by a parent or guardian entitled to the soldier's services, without whose consent he enlisted, and on application made before the soldier attains his majority. A soldier cannot himself avoid his enlistment contract upon this ground (12-446, 447; 30-246) (40-231, 248). But when a minor was induced to enlist by the false representation of a recruiter that the consent of his parents had been obtained, the enlistment was held voidable by the soldier (30-243).

### *Dependency*

21. Foster parents may, under proper circumstances, stand in the relation of the soldier's natural parents for the purpose of obtaining a discharge on account of their dependency (30-239) (40-230).

### *Conviction by civil court*

22. The regulation authorizing the discharge of a soldier for conviction by a civil court, is to be construed as applicable only to cases where such conviction occurs after enlistment (30-238) (40-p. 1004).

### *Low moral character*

23. When it is established by proceedings under applicable regulations that a soldier is of such low moral character as to render his retention in the service undesirable, he may be summarily discharged (30-249) (40-p. 1004).

### *For admission to the Soldiers' Home*

24. A soldier who has completed twenty years of honest and faithful service, who desires to enter the Soldiers' Home, and is eligible thereto, is entitled to be discharged (30-251) (40-1133).

*To accept a commission*

25. The acceptance by a soldier of a commission in the Navy operates to discharge him from the Army (30-307) (40-121 [7]). But acceptance of a commission in the Officers' Reserve Corps of the Army does not operate to terminate an enlistment in the regular army (30-311) (40-1344 [2]). A discharge to accept a commission is a discharge for the convenience of the government (30-269) (40-1486). A warrant officer who is placed on active duty under a reserve commission vacates his warrant officer status (40-Sup. 131).

26. The discharge of an enlisted man or warrant officer to accept a commission operates to remit any unexecuted portion of a court-martial sentence of forfeiture of pay even though his military service continues without interruption (43-467).

## VI. DISCHARGE BY PURCHASE

27. A soldier who is under a sentence of forfeiture cannot purchase his discharge although he tenders an amount sufficient to satisfy his fine in addition to the purchase price of the discharge, because forfeiture of pay is a punishment enforceable against pay only, and continues until pay accrues and has been collected (30-248) (40-232).

## VII. DISCHARGE FOR DISABILITY

28. A discharge on "surgeon's certificate of disability" (commonly referred to as "S. C. D.") operates as a remission of any unexpired sentences to confinement and forfeiture which the soldier is under at the time of its execution (30-274) (40-466 [6]).

29. A soldier discharged on S. C. D. for mental deficiency, who does not require institutional treatment and is considered capable of proceeding home without an attendant, may be regarded as competent to receive and receipt for money due him, but if he is so deficient as not to understand ordinary business transactions, settlement should not be made with him but with some duly appointed legal representative (30-1881) (40-p. 892).

## VIII. DISCHARGE FOR FRAUDULENT ENLISTMENT

30. A discharge for fraudulent enlistment on account of minority concealed does not operate as a remission of the unexpired portion of a sentence to confinement which the soldier is serving at the time of his discharge. A deserter who again enlists, claiming no prior service, and is discharged from the fraudulent enlistment, is still in the service under the prior enlistment with a charge of desertion undisposed of (30-275) (40-466 [7]).



## IX. REMARKS UPON DISCHARGE CERTIFICATE

31. The notation as to character refers both to character as a soldier and as a man (12-445). The endorsment relating to "wounds received in service" relates to injuries sustained in action with the enemy (30-253) (40-p. 983).

## X. WHO MAY ORDER OR SIGN

32. Generally speaking, the Secretary of War may authorize the discharge of any soldier for any reason at any time; but the matter is covered by regulations which, of course, should be followed. It has been held that an alleged deserter, who refuses to admit desertion and is physically incapacitated, may be summarily discharged without trial by authority of the War Department (30-240). Following the First World War it was held that, under this article, and without further legislation, but by appropriate change in Army Regulations, the President, the Secretary of War, or a corps area or department commander, might dispose of cases of members of the emergency forces who abandoned the service after the armistice (November 11, 1918) either by directing their discharge, with such character and notations thereon as the facts in the case warranted, or by directing their return to military control for trial by court-martial for desertion (30-173) (See also 40-Sup. 466).

33. A court-martial cannot impose any form of discharge other than dishonorable (12-462) or bad conduct.

34. If a Federal civil court, on *habeas corpus*, orders the release of a soldier he should be discharged, but a state court has no such authority (12-442, 443).

## XI. EXECUTION OF DISCHARGE

35. The date for the execution of a discharge is rarely, if ever, fixed by the authority ordering it, and a sentence to be dishonorably discharged "at such date as may be fixed by the reviewing officer" is improper (12-561, 562).

36. A discharge is not effective until the soldier has notice of it, actual or constructive. The discharge certificate is evidence of the discharge, and its delivery to the soldier is effectual notice, but he may be informed verbally, or otherwise, with equal effect. A court-martial order promulgating a sentence of dishonorable discharge does not effect the discharge. A certificate must be issued and delivered. The certificate cannot be issued until the order authorizing it is received at the place where it is to be executed. If confinement has been awarded it is the practice to place the certificate in the custody of the post commander, or other proper official, to be held

until the confinement has been executed (12-449, 451). But the soldier must be notified.

37. If the soldier is absent for his own convenience, or through his own fault, notice of the discharge should be lodged with his commanding officer, or other proper officer, which constitutes constructive notice (12-448, 449). But if the soldier remains in the service with the consent of the government, it constitutes a constructive reenlistment (30-348) (40-p. 999); and if the soldier sought to be discharged is insane, such constructive notice is not sufficient to effect his discharge because an insane man cannot be held responsible for his absence (30-278) (40-466 [4]). See Art. 2, Anno., par. 2a.

38. A discharge pursuant to sentence of court-martial, issued at the accused's proper station when he is absent in desertion, is effective. In such case the certificate should be forwarded to the War Department (30-278) (40-pp. 998-1002). However, a general court-martial order providing for the discharge of a soldier is not self-executing, and if, when such order is received, the soldier is absent in desertion, and no certificate of discharge is issued, the soldier is still in the service. The same is true if the soldier is sick in hospital (30-280) (40-pp. 998-1002). Current regulations (AR 615-360, 20 July 1944) provide that a discharge will not be executed, except for a conviction by a civil court, while an enlisted man or woman is absent without leave. The purpose of this regulation is to avoid immunizing such absentee from prosecution for absence without leave or desertion committed prior to discharge (44-410). A void certificate of discharge cannot be validated by the modification of the pertinent facts contained therein so as to show a later date of discharge or different reason therefor. Such void certificate should be recalled and a new certificate issued upon the actual execution of the discharge showing the actual date of, and the reason for, the discharge (47-70).

39. A soldier is entitled to be discharged at the expiration of his enlistment, but he remains in the service, and is entitled to pay and allowances, until his discharge is formally executed. The duty of discharging him rests upon the proper military superior (12-448, 613). The enlistment contract is conclusive as to the term of enlistment (30-362) (40-250 [1]).

40. In view of section 55, National Defense Act, as amended (M.L.U.S. 252, 2163a) extending all enlistments for the duration of war, the discharge of a soldier on December 7, 1941, for expiration of term of enlistment, was not operative unless he was notified of it before 1:25 P.M. of that date, the time of the outbreak of war (42-7).

41. An enlistment expires the day preceding its anniversary. A discharge given on that day is effective immediately upon delivery of

the certificate of discharge or other notice of discharge to the soldier. Thereafter he is a civilian even though he is paid for the full day and plans to reenlist the next (42-165). But if the certificate of discharge is not delivered to him until after his reenlistment the military jurisdiction is continuous (42-13).

42. It was formerly held that an insane soldier, or one too sick to receive notice, could not be discharged (12-458, 613), but regulations now provide a method by which insane soldiers may be discharged, and when the discharge is executed in the manner prescribed it will be effective to separate the man from the service. In any case, the Secretary of War is authorized to order the discharge of an insane man "in any manner he sees fit" (30-245, 277, 278) (40-pp. 986, 997).

43. The discharge of a soldier when he is sick in hospital will be effective unless it appears that he was, at the time, incapacitated to protect his interests. When a discharge certificate was sent to a soldier by registered mail and was not delivered because the soldier was unconscious and later died without regaining consciousness, it was held that the discharge was not effective and that the soldier died in the service (30-277) (40-pp. 998, 999). But where a soldier who had been sentenced by general court-martial to dishonorable discharge (suspended indefinitely), total forfeitures and confinement at hard labor for two years, and at the expiration of his sentence to confinement was sick in hospital, his dishonorable discharge, without any action looking to the vacation of the suspension of such discharge by competent authority, was unauthorized and void (46-284). (See A.W. 51b [1]).

44. That a soldier does not receive his final statement at the same time as his discharge certificate, does not affect his discharge (30-277) (40-pp. 999, 1000). (But see S.M.R. Act of 1944, above cited).

45. The approval of a sentence of a court-martial after the discharge of the accused from the service is a nullity (12-574).

46. A soldier's status as an enlisted man automatically terminates upon his acceptance of a commission (30-250) (40-121 [7]).

47. A discharge certificate cannot be antedated to show that a soldier was discharged on a date when he was not in fact discharged. If a soldier is discharged from an enlistment and immediately reenlists, and his discharge certificate is dated subsequently to his reenlistment, the discharge relates only to the enlistment to which it pertains as shown by the certificate, and does not operate to discharge the soldier from his second enlistment although his certificate is dated subsequently thereto (30-252) (40-466 [2]).

## XII. CANNOT BE REVOKED EXCEPT FOR FRAUD

48. An executed honorable discharge, issued by competent au-

thority, cannot be revoked unless obtained by fraud of the soldier concerned, and then only at the option of the government (12-455, 456; 30-282, 284, 287) (40-466 [11]) (47-70). An error in the discharge certificate may be corrected by the War Department (12-453) (40-466 [4]). An escaped general prisoner under a suspended sentence to dishonorable discharge was confined at an oversea detention barracks and "for lack of evidence" was released and transferred to the U. S. for separation. Relying upon the soldier's affidavit, the Separation Center issued a "temporary service record" and gave him an honorable discharge with travel pay, mustering-out pay and back pay. Held that since the soldier concealed his true status as an escaped general prisoner, such status was not changed by his return to military control, and that his discharge should be revoked for fraud, and that he should be apprehended by military authority as "a general prisoner, dishonorable discharge not executed" (46-284, 285).

49. When a soldier intentionally incurs a disability in order to obtain a discharge, and an honorable discharge is granted for such disability, the circumstances being concealed by the soldier, such discharge may be rescinded for fraud, and the soldier may be tried for the fraud and for intentionally disabling himself, or he may be discharged without honor. If the soldier disclosed that his disability was self-inflicted before his discharge, then there was no fraud. But in either case, if the disability was in fact intentionally incurred, the War Department may (if it does not elect to rescind the discharge for fraud) administratively change the character of the discharge from an honorable one to one without honor, or it may bring the case to the attention of the Secretary of War's Discharge Review Board (See note immediately following this Art.). If the soldier is not tried by court-martial the case may be referred to the Department of Justice for consideration under the act of March 4, 1909 (M.L.U.S. 806) (45-237, 238).

50. An executed dishonorable discharge cannot be revoked or modified (12-456, 460), even though the accused is subsequently found to have been insane (30-281) (40-466 [4]) (47-70). But see provisions of the Servicemen's Readjustment Act cited under this Article immediately preceding this Annotation relative to the review and modification of certain cases of discharge or dismissal.

51. An order directing a discharge may be revoked or suspended at any time before the discharge has been effected, and the discharge itself may be withdrawn before it has been fully executed by actual or constructive notice to the soldier (12-459). A discharge pursuant to an illegal sentence of a court-martial is void (12-459, 460).

51a. An order remitting the unexecuted portion of a sentence to confinement and vacating the suspension of a dishonorable discharge,

being a final judicial determination of the court-martial case, cannot be rescinded; but until dishonorable discharge has been executed the soldier is still in the service, and his discharge may again be suspended by competent order (43-307).

52. A discharge without honor, when fully and properly executed by competent authority cannot be revoked (12-456), but it may be modified to show the true circumstances of the case (30-283, 287) (40-466 [4]) (45-284).

53. A discharge certificate delivered by mistake to a soldier of the same name as the one for whom intended, is inoperative, although if accepted in good faith by the soldier to whom delivered it would protect him from a charge of desertion or absence without leave (30-276) (40-466 [3]); but the discharge of a soldier by competent authority, but through mistake (not of identity) is effective in the absence of fraud justifying cancellation (12-455, 456; 30-287) (40-466 [4] [11]). If, however, a discharge be "mistakenly issued" without proper authority, though not absolutely void, it is voidable. In such case it may be ratified by the Secretary of War (30-241) (40-p. 1002).

54. When a draftee who had been in service several months was issued a certificate of "discharge from the draft" for physical disqualification, it was held that, although improper in form, it separated him from the service, and that while a new certificate could not be substituted, notation should be made on his certificate to the effect that it was erroneously issued and that he was entitled to be considered honorably discharged (30-285) (40-466 [3]).

55. A fraudulent enlistment is not void, but voidable only at the option of the government, and if the soldier is permitted to complete it and receive an honorable discharge therefrom, such discharge cannot be revoked (30-284) (40-466 [11]).

56. A special act of Congress declaring that a certain former soldier "shall be hereafter held and considered to have been honorably discharged from the military service" on the date when he was, in fact, dishonorably discharged pursuant to a sentence of general court-martial, does not authorize or require the issuance to him of a certificate of honorable discharge (30-281) (40-466 [8]). Such special act merely gives the subject certain rights of an honorably discharged soldier although he was in fact dishonorably discharged.

### XIII. LOST CERTIFICATE

57. The Secretary of War, independently of any statute, upon satisfactory proof of the loss of a discharge certificate and identity of the subject, may issue a certificate of service substantially in the form of a "certificate in lieu of a lost discharge certificate" (30-

288) (40-236 [1]). A duplicate, or certified copy, of a discharge certificate is never issued.

57a. The photostating, for any legitimate purpose, of a certificate of discharge, or any other military document not classified as secret, confidential, or restricted, and which is lawfully in possession of the holder, is permissible (42-6).

#### XIV. NATIONAL GUARD IN FEDERAL SERVICE

58. The discharge of members of the National Guard in Federal service can be effected only by Federal authority. Officers are discharged by order of the President, enlisted men pursuant to section 72, National Defense Act (M. L. U. S. 1288) and Article 108, and warrant officers in the same manner as warrant officers of the regular army (30-289) (40-1300 [2]).

59. It was formerly held that a member of the National Guard, upon discharge from Federal service, reverted to a civilian status (30-290, 293). Under the present law (M. L. U. S. 1304) members of the National Guard of the United States "upon being relieved from active duty in the military service of the United States . . . shall thereupon revert to their National Guard status" (47-79). It would seem that there is a distinction between a "discharge" and a "relief from active duty," so that a member of the National Guard of the United States who is "discharged" while in active Federal service (as distinguished from being "relieved from active duty") would be held to be entirely separated from the military service, both Federal and state.

60. A member of the National Guard who innocently failed to report for duty with his organization when called into Federal service, and who subsequently reported and was erroneously informed that he had not been included in the call, was held to have been constructively discharged (30-291).

#### XV. RETIRED ENLISTED MEN

61. A retired enlisted man may be discharged at his own request, and such discharge, when legally executed, cannot be revoked (30-299) (40-466 [12]).

62. A retired enlisted man, commissioned as a temporary officer, upon discharge from his commission reverts to his retired enlisted status (30-318) (40-1344 [4]).

\* \* \* \*

*ARTICLE 109. OATH OF ENLISTMENT. At the time of his enlistment every soldier shall take the following oath or affirmation: "I, ———, do solemnly swear (or affirm) that I will bear true faith*

*and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War."* This oath or affirmation may be taken before any officer.

#### ANNOTATION

1. In a formal voluntary enlistment the oath is a statutory requirement and cannot be waived or modified (30-360) (40-1404 [3]). A formal voluntary enlistment consists of an offer by the applicant and an acceptance by the government. The administering of the oath by an officer authorized to act for the government constitutes such acceptance. Until the oath is so administered the applicant is a civilian (30-349, 360) (40-1404 [3]) (42-27). A reserve officer, as such, has no authority to administer the oath unless he is on active duty (48-86).\*

2. There may be a valid enlistment without the formalities above referred to. Acceptance of pay by the soldier, and acceptance of his services by the government is a constructive enlistment (12-602, 603; 30-346, 348) (40-467). In such case the soldier may be formally enlisted and the contract dated back to the date when his service actually began (30-349) (40-1486). The same is true when there is a delay, without fault of the soldier, between the date of his application and his actual enlistment (30-349, 350) (40-1486).

2a. An enlisted man of the National Guard of the United States in active service was discharged without honor for conviction of crime by a civil court, and returned to his home. Subsequently he was ordered to return to active duty and did so, performing normal military duties and receiving pay and allowances. Held that the discharge terminated his military status, but his compliance with the unauthorized order to return to active duty, constituted a constructive enlistment and restored him to the military service, but that he might be discharged for the convenience of the government (42-165, 166).

3. The soldier's signature to the oath, while usual and desirable, pertains to the proof rather than the essence, of the oath. It is not required by the Article nor essential to a valid enlistment (30-360).

3a. A drafted man who has been accepted by the military authorities at an induction center but who refuses to "take the oath" is subject to military court-martial jurisdiction. The oath prescribed by this Article is not a necessary formality in the induction of a drafted man (42-344). This decision (by the U. S. Circuit Court of Appeals) was reversed by the U. S. Supreme Court where it was held: That the acceptance of a selectee, and the ceremony of induction,

\* However, the Secretary of the Army may authorize inactive Reserve officers to administer the oath of enlistment in the Enlisted Reserve Corps (49-48).

are two separate parts of the induction procedure. He is actually 'inducted' and subject to military jurisdiction after he has been found acceptable and undergoes the prescribed induction ceremony, which ceremony, at the time of this decision, included the oath—Under par. 15f, AR 615-500, 10 August 1944, the oath is no longer required (44-122, 123) (45-420).

4. When there is a discrepancy between the period of enlistment applied for and that specified in the enlistment contract, the contract governs (30-360) (40-250 [1]). In the absence of fraud, the contract conclusively fixes the term of service (30-362) (40-250 [1]).

5. An enlisted man may be retained in the service, with his consent, after the expiration of his term of enlistment. Such retention is not a reenlistment, but a holding over under the former contract for the convenience of the government (30-362) (40-250 [2]).

\* \* \* \*

*ARTICLE 110. CERTAIN ARTICLES OF WAR TO BE READ OR EXPLAINED. Articles 1, 2, 24, 28, 29, 54 to 97, inclusive, 104 to 109, inclusive, and 121 shall be read or carefully explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read or explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States. And a complete text of the Articles of War and of the Manual for Courts-Martial shall be made available to any soldier, upon his request, for his personal examination. (As amended by S.S.A. '48, effective Feb. 1, 1949).*

(Note: Prior to amendment this Article did not include Articles 24, 28, 97, and 121 as among those required to be read or explained. The last sentence also was added).

*ARTICLE 111. COPY OF RECORD OF TRIAL. Every person tried by a general court-martial shall, on demand therefor, made by himself or by any person in his behalf, be entitled to a copy of the record of the trial. (See M.C.M. 41e).*

#### ANNOTATION

1. A carbon copy of the record of trial should always be made and, if not demanded by the accused, forwarded to be filed in the office of the Judge Advocate General. Only one such copy may be made at government expense. No one but the accused, or his duly authorized agent, is entitled to a copy. The furnishing of copies by trial judge advocates, stenographers, or others, is unauthorized (12-178; 30-1370, 1371) (40-469). In joint trials a copy should be



made for each accused (43-424). The accused's personal receipt for his copy of the record should be appended to, or shown by, the record. If it is not practicable to obtain such receipt, the officer making delivery should certify to the fact. A receipt signed with accused's name "by ..... Defense Counsel" is not proper (44-103) (M.C.M. 85b).

2. In common trials (where two or more cases against separate accused are consolidated for trial) only one original record is required, but a copy should be made for each accused, and separate court-martial orders should be issued (44-226).

\* \* \* \*

*ARTICLE 112. EFFECTS OF DECEASED PERSONS; DISPOSITION. In case of the death of any person subject to military law, the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the War Department; and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, provided the father has not abandoned the support of his family, mother, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations,*

any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions, to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.

### ANNOTATION

|   | Pars.  |
|---|--------|
| I. IN GENERAL .....   | 1-5    |
| II. TO WHAT PROPERTY APPLICABLE .....                                   | 6-6a   |
| III. DEBTS DUE .....  | 7      |
| IV. PERSONS ENTITLED TO EFFECTS .....                                   | 8-13   |
| V. DISPOSITION WHEN NOT CLAIMED OR WHEN<br>CLAIMS ARE CONFLICTING ..... | 14-18a |
| VI. PROPERTY SUBJECT TO LIEN .....                                      | 19-19a |
| VII. TRANSPORTATION .....   | 20     |

### I. IN GENERAL

1. This Article is not a statute of distribution. It merely provides a method of disposing of the effects by the military authorities, and when complied with the War Department is relieved from further responsibility (30-972) (40-470 [1]).

1a. Although not required by the Article, receipts should be obtained from persons to whom effects are delivered when practicable (43-430).

2. In making distribution of effects under this Article the military authorities are not concerned with inheritance tax laws. The summary court officer if not an administrator or executor, and has no authority to convey title to property or money, but is merely authorized to transmit it. For illustration, he cannot "indorse" a negotiable instrument so as to effect its legal transfer (30-969) (40-470 [2]).

3. The effects of unidentified soldiers may be disposed of under this Article. In such case the summary court should include in his report a full description of articles sold in order to facilitate identification in case claim is ever presented. The "place of command" is

clearly a typographical error. It should read "place *or* command" and is so construed (30-968) (40-470 [9]).

4. The provisions of this Article have been applied, so far as pertinent, to effects of deceased prisoners of war and interned alien enemies (30-976) (40-p. 17). An automobile belonging to an officer who is a prisoner of war may not be sold by the military authorities without a power of attorney to sell executed by the owner, but it may be shipped to a point designated by the Chief of Transportation and turned over to the owner's designated dependent (i.e. father) (43-286).

4a. This Article applies to Reserve Officers who die on active duty, as to effects at their last duty station (40-470 [11]).

5. It is the duty of the commanding officer to see that officers concerned in securing the effects of deceased soldiers are properly instructed as to their obligations in the premises (30-981) (40-470 [7]).

## II. TO WHAT PROPERTY APPLICABLE

6. This Article applies only to such effects as are left "in camp or quarters" (12-180). Liberty bonds fully paid for, found among the unclaimed effects of deceased soldiers, whose heirs cannot be located, may be taken over by a properly designated summary court officer for the district in which the bonds are held, regardless of where the soldiers died, and converted into cash and the proceeds disposed of as provided in this Article and applicable regulations (30-974) (40-470 [9]).

6a. This Article is not applicable to effects found in a "safety deposit box" outside the "camp or quarters" of the deceased soldier (42-27).

## III. DEBTS DUE

7. A balance left to the credit of a soldier, who died in France, in the Paris branch of an American bank, was held to be a "local debt" which the summary court might collect. The term "local debtors" refers to the locality of the camp or quarters of the deceased as distinguished from the locality of his home. The collection of such "local debts" by an executor or administrator is not precluded. The same has been held as to a bank account left by a deceased soldier in a bank in Hawaii (30-969 (40-470 [2])).

## IV. PERSONS ENTITLED TO EFFECTS

8. Should there be no widow or legal representative to whom the effects may be delivered, it is the duty of the summary court to send them to the persons named in the order designated. A brother takes precedence over a sister, and if there be more than

one brother the effects should be sent to the elder. However, delivery of the effects to one of the designated relatives out of the order named (i. e. to a sister instead of the father) will not render the government, or the summary court officer, liable. The matter is for adjustment between the parties claimant (30-972) (40-470 [5]).

8a. When the executor named in the will of a deceased soldier has not qualified, and the deceased's only known relatives live in a country occupied by the enemy (Holland), it is suggested that the summary court communicate with the attorneys for the estate for the purpose of having a special administrator appointed to whom the effects may be delivered, and failing in this, that the case be treated as one in which the persons entitled to the effects cannot be located (42-27).

9. It is optional whether the effects be delivered to the widow or legal representative where there are both (30-972). "Legal representative" means a duly appointed executor or administrator (12-180), and no right vests in him until he qualifies as such before a court of competent jurisdiction. The delivery of the property to a legal representative lawfully may not be made until he presents evidence of his qualification (30-968½). The usual "letters of administration" are *prima facie* evidence thereof (30-972). When the soldier leaves a will the summary court is put upon notice that a legal representative may be appointed. The person interested in the will should be notified and the effects held a reasonable time to determine whether a legal representative will be appointed (40-470 [4] [5] [6] [7]). When there are two administrators, both appointments being *prima facie* valid, the effects may be delivered to either, preferably to the first appointee. Both administrators should be advised that such delivery merely transfers possession of, and not title to, such effects, and is not a recognition or determination by the military authorities as to the ownership thereof (46-342). The effects may be delivered to the widow (or husband) of a deceased military person without the formality of letters of administration, and there is no limitation on the amount or value of such effects which may be so delivered, always with advice that such delivery does not establish title to the property (46-342).

9a. Where there is reasonable doubt as to the legal status of the alleged widow (i.e. whether she has been divorced from the deceased) the summary court should deliver the effects to the legal representative of the deceased (43-144). The questions of the continuance of the marriage relation after an interlocutory decree of divorce (i.e. a decree effective in the future), appointment of a legal representative (administrator, executor, etc.) and relinquishment by one spouse of survivorship rights in the estate of the other, are to be determined by State laws, and the summary court should make it clear, in trans-

mitting the effects, that only possession is being transferred, and not title (44-192).

9b. The widower of a deceased member of the Women's Army Corps is considered to be in the same position as the widow of a deceased male member of the Army for the purpose of this Article (44-192).

10. The term "beneficiary" means a beneficiary designated by a will which the law recognizes as legally sufficient to dispose of property. A brother or other person orally designated by a dying soldier to receive his effects is not a "beneficiary" within the meaning of this Article. But a life insurance policy in which a living person is named as beneficiary should be delivered to such named beneficiary if to be found, for the reason that the proceeds of such policy form no part of the estate of the deceased (30-972) (40-470 [5] [6]).

11. The person designated by deceased to be notified in case of emergency, or the beneficiary to whom the "six-months' pay gratuity" (M.L.U.S. 862) is to be paid, is not, as such, a beneficiary within the meaning of this Article, nor the legal representative (30-968½, 972) (40-470 [4]).

12. When the soldier allots a portion of his pay for the purchase of liberty bonds, the bonds may, upon his decease, be delivered to the person designated on the allotment form as the beneficiary (30-967) (40-470 [3]).

13. The War Department is not authorized to issue instructions to the legal representative of a deceased soldier regarding the disposition of a medal of honor belonging to deceased (30-966) (40-470 [1]).

#### V. DISPOSITION WHEN NOT CLAIMED OR WHEN CLAIMS ARE CONFLICTING

14. Where there are conflicting claimants and the summary court is unable to determine from the facts before him which is the legal claimant (in this case there were three women, each claiming to be the widow) he may sell such of the property as is subject to sale under this Article and send the proceeds, with the articles not permitted to be sold, to the War Department (30-971) (40-470 [6]).

15. It is incumbent upon the summary court officer to take such reasonable steps as may be necessary to satisfy himself that the person to whom delivery is made is one of those designated by the Article. Where there were three half-brothers it was held that the effects might be sent to one of them (30-972) (40-470 [5]).

16. During the First World War unclaimed effects of deceased soldiers, not subject to sale, were turned over to salvage officers to be

kept subject to claims of legal representatives (30-974) (40-470 [9]).

17. With respect to the effects of retired or former soldiers who die at military hospitals, the general rule seems to be that if such death occurs on a reservation over which the Federal government has exclusive jurisdiction Article 112 applies, but if death occurs at a place within the jurisdiction of the state, the unclaimed effects should be turned over to the proper state authorities (12-939; 30-973, 974) (40-470 [4] [7]).

18. Money found upon unidentified bodies washed ashore on a military reservation over which the Federal government has exclusive jurisdiction should be deposited in the U. S. treasury as property escheated to the Federal government; if on a reservation over which the state has jurisdiction, it should be turned over to the proper state authorities (12-939).

18a. Money belonging to an unknown deceased soldier should be deposited with an Army disbursing officer (43-145).

## VI. PROPERTY SUBJECT TO LIEN

19. In the case of property subject to lien (*e.g.* an automobile) the lien holder should be notified and given an opportunity to claim the property, and if he does not assert his claim, it may be turned over to the legal representative or nearest relative. The summary court officer is not authorized to sell such property and apply the proceeds in payment of obligations of the deceased, unless by express direction of, and as agent for, the person entitled under this Article (40-470 [10]).

19a. Property held by the deceased under a "conditional bill of sale" may be returned to the vendor if there is no cash available to pay his claim, if the vendor withdraws the claim against the deceased (40-470 [8]).

## VII. TRANSPORTATION

20. All "effects" which are capable of being packed, crated, and transported, without limit as to weight, may be shipped at government expense to the person entitled, except motor vehicles for which transportation between points within the continental limits of the United States is not authorized (40-470 [11], 1531b).

\* \* \* \*

*ARTICLE 113. INQUESTS. When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary*

*court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death.*

### ANNOTATION

1. In case of the death, on a Federal military reservation, of a soldier, or a civilian residing on such reservation, Article 113 applies, and if no violation of state laws is involved, no inquest by the state authorities is necessary or proper. But where such person meets death outside the reservation, or dies on the reservation as a result of criminal acts committed off the reservation, the civil authorities should be permitted to conduct an inquest on the reservation, or remove the body from the reservation for that purpose (12-270).

2. When the death of a military person occurs in the performance of military duty (e.g. flying a military airplane) the civil authorities should not take jurisdiction; but when a soldier is killed by a person not subject to military law, it would be proper for the coroner to perform his duties under the state law, provided, of course, that the homicide occurred at a place within the state's jurisdiction (30-977) (40-471). In case of the sudden or violent death of a military person at a place over which the United States does not have exclusive jurisdiction the coroner of the county in which the body is found is not prohibited by Federal law or regulations from conducting an inquest required by state law. However, in the interest of comity and military necessity of safeguarding information vital to the national defense, such inquests should be conducted so as not to interfere with an investigation by the military authorities and the safeguarding, removal, or other disposition by them of military equipment or materiel involved (43-192, 193).

2a. An Army aviation cadet and a civilian pilot instructor were killed in an airplane accident at a civilian air training school not owned by, nor subject to, the exclusive jurisdiction of the United States. The local civil authorities asked the Army to conduct an investigation in the nature of a coroner's inquest. Held that the request could not be granted; that the Army may investigate the deaths of military personnel, wherever they may occur, for the purposes of military administration, but an Army investigation in the nature of a coroner's inquest may be conducted only when death occurs on a military reservation subject to the exclusive jurisdiction of the United States (42-166) (43-192, 193).

3. An army surgeon has the legal right to perform an autopsy in all cases of the death of persons subject to military law if there is a sound military reason therefor (30-977). If the post commander con-

siders it necessary, he may order the summary court officer to have an autopsy performed (40-471).

\* \* \* \*

**ARTICLE 114. AUTHORITY TO ADMINISTER OATHS.** *Any officer of any component of the Army of the United States on active duty in Federal service commissioned in or assigned or detailed to duty with the Judge Advocate General's Department, any staff judge advocate or acting staff judge advocate, the president of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant, assistant adjutant or personnel adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and shall have the general powers of a notary public in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law: Provided, That no fee of any character shall be paid to any officer mentioned in this Act for the performance of any notarial act herein authorized. [As amended by the act of December 14, 1942 (M.L.U.S. Sup. 472)] (See M.C.M. 104).*

### ANNOTATION

|   | Pars.  |
|---|--------|
| I. IN GENERAL .....                           | 1-3a   |
| II. INDIVIDUALS AUTHORIZED .....              | 4-7b   |
| III. PURPOSES AUTHORIZED .....                | 8-9    |
| IV. IN FOREIGN PLACES .....                   | 10-11c |
| V. DEPOSITIONS .....                          | 12-13  |
| VI. NATIONAL GUARD AND RESERVE OFFICERS ..... | 14-16  |

### I. IN GENERAL

1. When necessary to authenticate the signature of an officer administering an oath under this Article, such signature can be certified by The Adjutant General's Office by comparison with the officer's official signature on file in the War Department (30-492) (40-472 [6]).

2. This Article, being a statute conferring authority, must be strictly construed (30-488) (40-472 [4]).

3. The power given by this Article to the president and recorder of a military board to administer oaths, is not a statutory authority for



the board to examine witnesses under oath. Such boards are not so empowered unless specifically so authorized by statute, as, for instance, retiring boards and boards convened under Article 105 (30-Sup. 1582) (40-451 [52]).

3a. Under this Article (amended as above) the classes of officers authorized to administer oaths are somewhat broadened, and they are given general notarial powers wherever they are stationed, whether within or outside the United States. But the legal effectiveness of documents of a civil nature depends upon the laws of the jurisdiction (state, territory, district, etc.) where they are executed and used. The existing laws of most states do not recognize the validity of civil instruments executed under the provisions of the Article. It is not advisable, therefore, to exercise the general notarial powers granted by this Article except in matters connected with military administration or other Federal purposes, and in individual cases where it is known that the validity of a document executed as provided in this Article is recognized in the jurisdiction concerned (43-17-21) (44-347).

## II. INDIVIDUALS AUTHORIZED

4. A retired officer on active duty and serving in any one of the capacities designated, such as summary court, is authorized to act under this Article (30-1356) (40-221).

5. The term "adjutant of any command" includes any and all military commands having an adjutant, whether territorial or tactical, and whether separate or present with, and part of, a higher command. It includes an acting adjutant, but not a personnel or assistant adjutant unless he is "acting adjutant" and signs as such (30-489, Sup. 489) (40-472 [4]). But under the Act of August 21, 1941, a warrant officer, when serving as assistant adjutant of any command, is authorized to administer oaths for all purposes of military administration, but the authority does not extend to a commissioned officer (40-Sup. 131c) (42-320). The adjutant of an air base squadron is an "adjutant of a command" within the meaning of this Article (43-193).

5a. Officers on duty as adjutants general in the office of The Adjutant General are included in the term "assistant adjutant of any command" as used in this Article (43-21). The "personnel officer" of a command has the same status as that formerly held by "the personnel adjutant" and may administer oaths under this Article as amended (43-272). The Chief, Assistant Chief, and Acting Chief of the Adjutant General Branch of the Administrative Division of the staff of a Service Command correspond to the adjutant, assistant adjutant, and acting adjutant, respectively, of a command. Similarly the Chief and Acting Chief of the Military Personnel Branch of the Personnel Division correspond to the personnel officer and acting

personnel officer, respectively, of a command. Wherever such correlation is present the officers named are empowered to administer oaths under this Article. The Assistant Chief of the Military Personnel Branch, the Chief, and other officers of the Civilian Personnel Branch, and the Directors of the Administrative and Personnel Divisions of such headquarters organization have no counterparts among the persons mentioned in Article 114 and accordingly are not so authorized. The same as to corresponding officers of a post, camp, or station headquarters similarly organized under the Army Service Forces. In organizations constituted in a different manner from the above, the authority under this Article is vested in officers whose positions correspond to those of adjutant, acting adjutant, and personnel adjutant of a command (43-386).

5b. An officer of the Quartermaster Corps detailed as "post judge advocate" by the commanding officer of a post where a "judge advocate branch" of the post staff is authorized, is an "acting judge advocate" within the meaning of this Article (43-100).

5c. A warrant officer, assigned by competent authority as adjutant, or personnel adjutant of a command, is authorized to administer oaths for all military purposes, and may also exercise the notarial powers mentioned in this Article (44-15).

6. An "executive officer," although performing duties ordinarily performed by an adjutant, is not empowered to administer oaths (30-488) (40-472 [4]).

7. Any of the officers designated by the Article serving at an arsenal is competent to administer the oath of office to a civilian employee of the arsenal (30-Sup. 767) (40-472 [1] [2]).

7a. Any officer, temporary or permanent, who is assigned to, or detailed for duty in, the Judge Advocate General's Department, is authorized to administer oaths under this Article (42-28).

7b. An officer serving as a "one-man" board is within the meaning of the phrase "the president of a military board" for the purposes of this Article (44-347).

### III. PURPOSES AUTHORIZED

8. The exercise of the powers conferred by this Article, as amended, by an Officer serving in any of the capacities specified in the Article, is not confined to matters within the particular functions of his office or position (44-347).

8a. Any of the officers designated by the Article are authorized to administer oaths to military persons or civilians incident to the presentation of a claim against the United States which, if allowed, will be paid out of an appropriation for the military activities of the War Department (42-28). But the Comptroller General has ruled

that the authority to administer oaths conferred by this Article does not extend to the administration of oaths to persons not subject to military law incident to the presentation of claims for the "death gratuity" (M.L.U.S. 862) (44-383).

9. The oath of office of an officer of the National Guard of the United States cannot be administered by an officer acting under this Article since it contains an obligation to the State as well as to the United States (30-Sup. 488) (40-472 [1]).

#### IV. IN FOREIGN PLACES

10. Letters rogatory addressed by a foreign court to a court of the United States can legally be executed outside the territorial jurisdiction of the United States by a military officer under the provisions of this Article (30-492) (40-472) [6].

11. A commission to take depositions of witnesses for the purpose of proving a will executed in a foreign country may be issued to any officer available and authorized under this Article (30-981) (40-472 [6]).

11a. The Treasury Department will accept income tax returns of military persons and civilians serving with the Army in foreign places sworn to before an officer authorized by this Article (42-28).

11b. In foreign places any officer authorized to administer oaths by this Article has the general powers of a notary public or a consul of the United States in the administration of oaths, the execution and acknowledgement of legal instruments, the attestation of documents and all other forms of notarial acts to be executed by persons subject to military law (42-327).

11c. Though not strictly within the purview of this Article, it may be noted that Chaplains may solemnize marriages in foreign jurisdictions only if qualified under the local laws (43-265).

#### V. DEPOSITIONS

12. A deposition taken by an officer other than the one designated to take it (see Article 26) and who is not authorized to administer oaths under this Article, is inadmissible in evidence (30-488).

13. The certificate of an officer taking a deposition that the deposition was "duly taken" by him is *prima facie* evidence that the officer was designated to take it and to administer the oath necessary for the purpose (30-488) (40-383).

#### VI. NATIONAL GUARD AND RESERVE OFFICERS

14. The authority of a National Guard officer in Federal service to administer an oath for military purposes is derived from this Article and not from any state law (30-490) (40-472 [5]).

15. A National Guard officer not in Federal service, in the absence of a statute conferring upon him general notarial powers, is not authorized to administer the oath of office to a reserve officer; and the same is true of a reserve officer not on active duty (30-490) (40-472 [5]) (48-86).\*

16. Reserve officers on active duty and National Guard officers in Federal service are authorized to administer oaths under this Article in the same manner and to the same extent as officers of the regular army (30-Sup. 490) (40-472 [5]).

\* \* \* \*

*ARTICLE 115. APPOINTMENT OF REPORTERS AND INTERPRETERS. Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of, and testimony taken before, such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission. (See M.C.M. 46 and 47).*

#### ANNOTATION

1. The employment of a reporter when none was authorized in the convening order is an irregularity which does not affect the validity of the proceedings (30-1376) (40-473 [1]).

2. An enlisted man detailed as a reporter for a general court-martial is limited to the compensation fixed by law and regulations and may not be paid anything further for one or more copies of the record (30-1870) (40-1436) (42-54).

2a. An enlisted man of the Navy, being "a person who is in the pay of the government", may not be paid from Army appropriations for services as reporter of an Army court-martial (43-123). The same as to a member of the Women's Army Auxiliary Corps (43-222). But enlisted members of the Women's Army Corps are in legal effect "enlisted men" of the Army and are eligible to receive extra pay for services as reporters for general courts-martial, courts of inquiry, military commissions, and retiring boards (43-357). See Article 2, Annotation, par. 5c. An enlisted man detailed by the trial judge advocate of a general court-martial to take depositions prior to the trial is not entitled to extra pay for such service (44-262).

3. The compensation of a civilian stenographer employed by an officer detailed to investigate court-martial charges against a soldier, the service being rendered in good faith and being reasonably nec-

\* But see A.W. 109, Annotation, par. 1 (Sup.) as to authority of inactive Reserve officers to administer the oath of enlistment in the Reserve Corps.

essary to a proper conduct of the investigation, may be paid out of the appropriation for the expenses of courts-martial (30-1265).

4. If the accused is unable to understand the explanation of his counsel and the court relative to the nature of the offense charged and his rights as a witness, or to comprehend what occurred during the trial, the failure to provide an interpreter will be ground for disapproval of the proceedings (30-1308) (40-473 [2]) (48-191).

5. An interpreter should give a literal translation of the questions and answers, but if he uses the third person, stating the correct substance of the witness' answers, the irregularity will not be considered prejudicial (30-1308) (40-473 [2]).

6. A person who is a witness against the accused should not act as interpreter, but the substantial rights of accused will not, necessarily, be injuriously affected thereby (30-1308).

7. A civilian employee of the government drawing a regular salary of more than \$2500 a year cannot be paid any additional compensation as a court-martial reporter (M.L.U.S. 317a; 42-28).

\* \* \*

**ARTICLE 116. POWERS OF ASSISTANT TRIAL JUDGE ADVOCATE AND OF ASSISTANT DEFENSE COUNSEL.** *An assistant trial judge advocate of a general or special court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused. (As amended by S.S.A. '48, effective Feb. 1, 1949). (See M.C.M. 42 and 44).*

**ARTICLE 117. REMOVAL OF CIVIL SUITS.** *When any civil or criminal prosecution is commenced in any court of a State of the United States against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed by law, and the cause shall thereupon be entered on the docket of such district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine said cause. (As amended by S.S.A. '48, effective Feb. 1, 1949).*

**ARTICLE 118. OFFICERS, SEPARATION FROM SERVICE.** *No officer shall be discharged or dismissed from the service except by order of*

*the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction. (See M.C.M. 87b).*

[See provisions of the Servicemen's Readjustment Act of 1944 cited under Article 108 relative to the review and modification of certain cases of discharge or dismissal.]

### ANNOTATION

|   | Pars.  |
|---|--------|
| I. DISCHARGE BY ORDER .....                                       | 1-6    |
| II. DISMISSAL BY THE PRESIDENT .....                              | 7-10   |
| III. DISMISSAL BY SENTENCE OF COURT-MARTIAL .....                 | 11-12b |
| IV. DROPPED FROM THE ROLLS .....                                  | 13-15  |
| V. WHOLLY RETIRED .....   | 16     |
| VI. DISCHARGED UNDER SECTION 24b, N.D. ACT .....                  | 17     |
| VII. RESIGNATION .....  | 18-36  |
| VIII. ACCEPTANCE OF CIVIL, OR INCOMPATIBLE MILITARY, OFFICE ..... | 37-38a |
| IX. DISCHARGE OR DISMISSAL CANNOT BE REVOKED .....                | 39-44  |
| X. NATIONAL GUARD AND RESERVE OFFICERS .....                      | 45-52a |
| XI. WARRANT OFFICERS .....  | 53     |

#### I. DISCHARGE BY ORDER

1. In general, a discharge by order is presumed to have been under honorable conditions unless the order or certificate of discharge recites facts precluding such presumption (30-226).

2. An order discharging an officer becomes effective from the date he receives notice of it, and if he is absent without leave it becomes effective upon the receipt of official notice thereof at his proper station (30-232) (40-476 [1] [7]).

3. The term "discharged," as applied to an officer, implies a separation from the service for the convenience of the government (30-1803) (40-1468).

4. An officer separated from the service by discharge is not entitled to have his baggage shipped to his home at Government expense (40-1468). Under the Pay Readjustment Act of 1942 he is entitled to

mileage of 8¢ per mile for land travel in the United States in North America (except Alaska), and actual expenses outside such limits (including sea travel), from the place of discharge to his place of residence (M.L.U.S. Sup. 1371c [12]).

5. A provisional officer who was discharged upon the findings of a board of officers that he was lacking in the "necessary mental qualifications required of an officer" and to have "failed to demean himself in such manner as to indicate his appreciation of the proper ideals of an officer and a gentleman," there being no record of any misconduct involving moral turpitude, no charges pending, and he being, at the time of discharge, in a status of honor, was held to have been separated from the service under honorable conditions (30-Sup. 294).

6. After an officer's discharge it was discovered that checks issued by him in settling his accounts were worthless. There was no evidence that the officer had represented to the discharging authority that his indebtedness was paid, or that the discharge was procured by fraud. It was held that there was no ground for rescinding the discharge and holding the officer for trial by court-martial (40-476 [2]).

## II. DISMISSAL BY THE PRESIDENT

7. Dismissal by executive order is quite distinct from dismissal by sentence of court-martial: the latter is a punishment, the former removal from office. Summary dismissal is authorized only in time of war. It has been exercised for the purpose of ridding the service of undesirables. It may be exercised in cases where a court-martial has acquitted the officer of the very offenses on account of which the summary action is resorted to (12-819).

7a. An officer who is convicted by a civil court of receiving a fee for services rendered to a private corporation in violation of section 113, Federal Criminal Code (M.L.U.S. 842), is immediately "removed from his office" by operation of law. In addition to the penalty for such violation the statute provides that an officer so convicted shall "thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States." This provision becomes effective upon conviction by the trial court and an entry of judgment thereon despite the pendency of an appeal, particularly when his separation from the military service is announced in orders by direction of the President and the vacancy is filled by the appointment of another with ratification by the Senate (43-468).

8. An officer summarily dismissed by order of the President in time of war is not entitled to trial by court-martial (30-237) (40-227).

9. Summary dismissal by executive order is a separation from the service under other than honorable conditions (12-439, 821). Instances may be cited as follows: On account of excessive use of intoxicants

(30-228, 300); "mentally and morally disqualified for the command of troops," although the words "mentally and morally" were subsequently eliminated in an amended order; and dishonorable conduct before appointment not known to the military authorities at the time of appointment (30-300) (40-476 [6]).

10. A summary dismissal takes effect upon notice to the officer concerned. The order may fix a date in the future, in which case the officer continues to hold his commission, and all his acts, whether of command or staff, are legal until the date fixed, and he receives notice of the dismissal (12-820).

### III. DISMISSAL BY SENTENCE OF COURT-MARTIAL

11. Dismissal by sentence of court-martial takes effect when the confirmation (see Article 48, Confirmation) is officially communicated to the officer concerned. The confirmation cannot be antedated, and if the sentence is not legal there is no dismissal and the fact may, at any time, be declared in orders (12-817, 818). When an officer is absent without leave when notice of the confirmation of his dismissal is received at his station, he is constructively notified (40-476 [7]). An officer sentenced to dismissal with no forfeitures or confinement, is entitled to draw pay until he is chargeable with notice of his dismissal (40-Sup. p. 33).

12. In the case of a retired soldier in active service as a temporary commissioned officer, who, as such officer, is tried and convicted of a violation of Article 95 (Conduct Unbecoming) and sentenced to dismissal, such dismissal relates only to his status as a commissioned officer and does not operate to deprive him of his status as a retired enlisted man (30-318, 545).

12a. A sentence of dismissal is in itself a dishonorable separation from the service. The addition by the court of the words "without honor" is superfluous; they add nothing to the sentence, neither do they invalidate it (42-16) (43-210, 430). A sentence to be "dishonorably discharged" is inappropriate in the case of a commissioned officer. It is not illegal and will be regarded as a sentence to "dismissal". "Dishonorable discharge" and "Dismissal" are legal equivalents insofar as they preclude receipt of benefits under acts which are limited to cases of separation from the service under honorable conditions (44-281).

12b. A sentence of dismissal or reduction (see Art. 44) of an officer, or dismissal or suspension of a cadet, must be ordered executed by the confirming authority (Art. 48; M.C.M. 87b).

### IV. DROPPED FROM THE ROLLS

13. An officer dropped from the rolls by order of the President is



fully separated from the service. The President's action in such case cannot be reviewed by any court (12-425, 426).

14. After being dropped from the rolls an officer is no longer a person subject to military law and consequently cannot be tried by court-martial for desertion or any other offense under the Articles of War (except as provided by Article 94, Frauds) committed before he was so dropped (30-1325) (40-359 [2]). For this reason an officer should not be dropped from the rolls when he is known to have committed an offense for which he should be brought to trial, nor when he is absent without leave under conditions indicating that he is not mentally responsible for his acts (30-229) (40-476 [9]).

14a. Two years after having been dropped from the rolls under this Article an officer reappeared showing signs of mental unbalance. Held that he was not entitled to hospitalization as a member of the Army because he had been completely separated from the service (42-216).

15. A retired officer who cannot be found at the address last reported by him, and whose whereabouts cannot be ascertained, is "absent from duty" within the meaning of this Article and may be dropped from the rolls by order of the President when he has been thus absent for three months (30-298) (40-476 [10]).

## V. WHOLLY RETIRED

16. Whether separation from the service by being "wholly retired" (M.L.U.S. 324) is to be regarded as under honorable conditions depends upon the circumstances of the particular case. Mental deterioration due to chronic alcoholism is not regarded as an honorable condition (30-230) (40-324).

## VI. DISCHARGED UNDER SECTION 24 b, N. D. ACT

17. An officer discharged for inefficiency due to his neglect, misconduct, and avoidable habits is considered as not separated from the service under honorable conditions (30-227) (40-324); but a discharge for "temperamental unfitness," no moral turpitude involved, is regarded as honorable (30-294).

## VII. RESIGNATION

18. An officer who voluntarily resigns is regarded as having been separated from the service for his own convenience (30-1803) (40-1468).

19. While it is customary to permit an officer in good standing to resign in time of peace, it is a privilege and not a right, and may be refused. It was refused in the case of an officer who, in consideration

of the privilege of taking a six months' course of instruction abroad, agreed not to resign within three years after the completion of such course, and, within such three years, repudiated his agreement and tendered his resignation (30-534) (40-p. 989).

20. An officer absent in desertion cannot resign, and the unconditional resignation of one under charges will generally be refused; also when submitted in time of war (12-816).

21. An insane officer cannot resign, but should his resignation be accepted without knowledge of the insanity, and the vacancy filled by the appointment of another, the resignation would legally be effective (12-816).

22. The President, or any officer designated by him, may accept resignations. The effective date is the date of notice, actual or constructive, to the officer of the acceptance (12-816, 817; 30-Sup. 530) (40-p. 890).

23. The resignation of an officer traveling abroad will be effective upon receipt of notice of its acceptance at the place from which it was tendered, or the address given in the resignation, in the absence of other information in the War Department as to his whereabouts (30-530) (40-p. 889).

24. A resignation may be submitted to take effect upon a condition subsequent, such as breaking a pledge to abstain from the use of intoxicants, and upon the happening of the event, it may be accepted and become effective (12-816).

25. If the resignation be not formally accepted but the vacancy is filled, it will be considered as accepted, and the officer will be deemed to have vacated his office on the date he received actual or constructive notice of the new appointment (12-817).

26. In accepting a resignation the President may make such remarks as he may deem appropriate. An unqualified acceptance of an unqualified resignation is generally regarded as an honorable separation from the service (12-817).

27. A resignation may be withdrawn before its acceptance; and after acceptance, but before notice, it may be withdrawn with the consent of the appointing power, but not otherwise (12-815).

28. In general, separation from the service by resignation is regarded as honorable except when tendered, or accepted, "for the good of the service" (30-526) (40-pp. 989, 990); but if, although unconditional, the record shows that the officer was under charges at the time, and resigned to escape trial and punishment, it will not be so regarded (30-527) (40-p. 990). When an officer was serving a sentence in a penitentiary imposed by a state court, although his resignation was tendered and accepted in terms unconditional, it was held that the character of his discharge was governed by the actual conditions

which required his expulsion from the service without honor, and must be so regarded (30-528) (40-p. 991).

28a. A resignation "for the good of the service" is different in theory and practical effect from separation by dismissal. The first is a separation "under conditions other than honorable." The latter is tantamount to a dishonorable discharge. The first may be altered administratively. The latter may not be changed or revoked. There are numerous benefits provided by various statutes for ex-service men who have been "honorably discharged." Under such a statute there is no distinction between a resignation for the good of the service and a dismissal because neither is an "honorable discharge." But there are other statutes which exclude persons "dishonorably discharged" from their benefits. Under these laws the status of an officer who "resigned for the good of the service" may be administratively determined (43-430) (47-211). See also provisions of the Servicemen's Readjustment Act of 1944 cited under Article 108 relative to review and modification in certain cases of dismissal.

29. An officer who was guilty of disgraceful conduct for which he had been reprimanded, and whose resignation six months later was unconditionally accepted, there being nothing to show that he resigned to escape further disciplinary action, was held to have left the service under honorable conditions (30-529) (40-p. 990).

30. When an officer who was "short in his accounts," but had sufficient pay due him to cover the shortage, was allowed to resign upon condition that no payment be made to him until he had settled all of his accountability, it was held that as the War Department evidently considered that the facts did not warrant bringing him to trial, his resignation should be regarded as accepted under honorable conditions (30-529) (40-p. 990). This is a border-line case, probably decided upon the theory of a constructive condonation.

31. The acceptance of an officer's resignation while he is under a sentence of a general court-martial operates as a constructive remission of the unexecuted portion of the sentence (30-531) (40-p. 991).

32. Where an officer's resignation has been tendered and accepted to take effect at a future date, and before that date arrives he asks to withdraw it, the acceptance of the tender may be recalled and the officer be permitted to withdraw it provided no rights of another have intervened (30-532) (40-p. 991).

33. An unconditional resignation submitted under circumstances indicating that it was tendered to avoid an investigation of charges, must be regarded as "for the good of the service," and cannot be withdrawn without the consent of the appointing power (30-533) (40-pp. 991, 992). But when an officer under charges definitely refused to resign "for the good of the service" and tendered an unconditional resignation which was accepted, it was held to amount to a condona-

tion of his offenses and to constitute an honorable separation from the service (30-Sup. 527) (40-p. 991).

34. A provisional officer resigned when he was about to be examined for a permanent commission. In forwarding the resignation the commanding officer stated that had the resignation not been submitted charges would have been preferred against the officer for drunkenness and neglect of duty, and recommended that he be not considered for a permanent commission. The resignation was accepted. There being nothing else of record, his separation was held to be honorable (30-Sup. 529) (40-p. 990).

35. The unconditional resignation of an officer who is in debt beyond his present ability to pay will, in the absence of any threatened disciplinary action, be regarded as an honorable separation (30-Sup. 526) (40-p. 990).

36. The announcement, subsequent to his resignation, of the promotion of an officer as of a date prior to his resignation, is of no effect (30-1808) (40-p. 889).

#### VIII. ACCEPTANCE OF CIVIL, OR INCOMPATIBLE MILITARY, OFFICE

37. Under Section 1222 of the Revised Statutes (M.L.U.S. 315) an officer of the regular army on the active list who accepts, or performs the functions of any civil office, Federal, state, or municipal, even though such office is nonremunerative, thereby vacates his commission as an officer of the army (30-303, Sup. 118) (40-260, 315). This statute does not apply to retired officers (42-153, 154).

38. The National Guard of the United States, being at all times a component part of the Army of the United States, an officer of the regular army on the active list may not be appointed an officer of the National Guard of the United States, the two offices being incompatible (30-Sup. 306 *a*) (40-1266 *a*). This restriction does not apply to retired officers (40-1266 *d*).

38a. An appointment to higher temporary grade in the Regular Army does not vacate the permanent appointment of the officer concerned (42-297).

#### IX. DISCHARGE OR DISMISSAL CANNOT BE REVOKED

39. An honorable discharge, not obtained by fraud, cannot be revoked (12-455; 30-233, 236, 292) (40-476 [2]) (46-278).

40. A complete separation from the service whether by sentence, summary dismissal, resignation, or by being "wholly retired," cannot be revoked. The officer so separated can be restored only by a new appointment (12-808, 817, 818, 820, 821; 30-235, Sup. 235) (40-476 [5] [8], p. 991). But see Servicemen's Readjustment Act of 1944

(M.L.U.S. Sup. 1164 [2] [6]) cited under Article 108. Also see A.W. 53.

41. A discharge under "Class B" proceedings, there being no irregularity of record, cannot be revoked (30-234) (40-225 [1]).

42. An officer serving in France was ordered to be dismissed pursuant to sentence of a general court-martial effective March 14, 1919. He was returned to the United States and there honorably discharged for convenience of the government on March 6, 1919. Notice of the general court-martial order was not received in the United States until March 29, 1919. It was held that the officer was under no obligation to divulge the fact that he was under a sentence of dismissal, and as it did not appear that any questions were asked him to elicit the information, fraud could not be imputed to him, and his separation from the service must be regarded as by honorable discharge on March 6, 1919 (30-300). The honorable separation from the service of an officer by order of competent authority, pending action by the confirming authority upon a sentence to dismissal imposed by a general court-martial, is valid, fully executed and cannot be recalled or revoked (46-278).

43. An order of discharge obtained by the officer concerned without authority and by fraud is not effective. However, when the proceedings of a board which recommended an officer's discharge were irregular and unfair, the President's order based thereon can not be said to be illegal (30-233, 236) (40-476 [3]).

44. If the order of discharge describes the officer as a captain when he was in fact a major, the error is immaterial so far as his separation from the service is concerned, and it may be corrected by an amended order (30-231) (40-476 [4]).

## X. NATIONAL GUARD AND RESERVE OFFICERS

45. Officers of the National Guard in Federal service, and reserve officers on active duty, should be discharged by order of the President. Such order may be communicated by the Adjutant General "by direction of the President" (30-289, 293, 295) (40-1300 [2], 1358 a). The President has discretionary power to discharge a member of the Officers' Reserve Corps for any reason, or no reason, and this power is not limited by the recommendations of a classification board. The power may be delegated to the Secretary of War (43-112).

45a. Appointments in the Officers' Reserve Corps current at the outbreak of war, and those subsequently made, continue in force (at the President's discretion) until six months after the termination of the war. A reserve officer is entitled to relief from active duty within six months after the termination of the war if he applies therefor. A state of war does not ordinarily end with the termination of hos-

ilities, but continues until the conclusion of a treaty of peace or some date fixed by law or Presidential proclamation. It thus appears probable that all officers of the Army will remain subject to active duty for some time after the cessation of actual hostilities (43-156) (M.L.U.S. Sup. 2228).

46. The discharge of a reserve officer with character not stated may, in the discretion of the Secretary of War, in view of the officer's record, be regarded as not honorable (30-296).

47. A reserve officer on active duty may be summarily discharged by the President for acts of disloyalty committed before he was ordered to active duty (30-297) (40-1358 a).

48. One cannot hold two commissions in the army at the same time without express legislative authority. A federally recognized officer of the National Guard, or a reserve officer, who accepts a commission in the regular army thereby vacates his National Guard, or reserve, commission. An officer may hold only one commission in the reserve corps at the same time, and acceptance of a new reserve commission vacates the old, whether in the same or another branch (30-303, 308, 309) (40-1344, 121 [10]). Acceptance by an officer of the National Guard of the United States of an appointment in the Officers' Reserve Corps vacates his National Guard commission (43-111).

49. Acceptance by a member of the Officers' Reserve Corps of the Army of a commission in the Marine Corps Reserve would vacate his appointment in the former (30-313) (40-1344 [3]).

50. A National Guard officer in Federal service can not resign without consent of the War Department (30-535) (40-1300 [2]).

51. A reserve officer may be enlisted as a flying cadet and continue to hold his reserve commission, but a call to active duty under his commission would entail his discharge as a flying cadet (30-310) (40-35).

52. A reserve officer who accepts a commission in a foreign army thereby expatriates himself and should be discharged by order of the President. But employment by a foreign government as a commercial agent in the United States, or a contract with a foreign government to train personnel and operate airplanes, but not requiring an oath of allegiance or submission to a military code, and automatically lapsing upon the outbreak of war, does not require discharge from the reserve corps (30-Sup. 315 a, 364) (40-558).

52a. A Reserve officer enlisted in the Canadian army in June, 1941. While on leave from the Canadian army he entered on active duty in the Army of the United States. Held that the Canadian enlistment, whether or not it deprived him of his citizenship, did not affect his status as a Reserve Officer; that it is ground for his discharge from the Officers' Reserve Corps, but he may be retained in the service if desired (42-140).

## THE ARTICLES OF WAR

## XI. WARRANT OFFICERS

53. The provision in this Article that "in time of peace no officer shall be dismissed except pursuant to the sentence of a general court-martial or in mitigation thereof" does not apply to warrant officers. They hold office at the discretion of the Secretary of War, and legally may be discharged or dismissed at his pleasure (30-301, 536) (40-13). Separation from the service of a warrant officer by sentence of court-martial should be by dishonorable discharge (M.C.M. 116c).

\* \* \* \*

*ARTICLE 119. RANK AND PRECEDENCE AMONG REGULARS, MILITIA, AND VOLUNTEERS. That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade.*

## ANNOTATION

1. When command devolves upon an officer by reason of his seniority, no order placing him in command is necessary (30-1814) (40-1428 [2]).

2. Only the President, acting under authority of this Article (and as the constitutional commander-in-chief he, no doubt, has the authority without the aid of the statute) is authorized to assign a junior officer of an organization to take command while a senior officer is present and available for such duty, and an order to such effect issued by any other authority is void (30-1814, 1815) (40-1428 [2] [3]) (43-443). However, by War Department regulations (promulgated by direction of the resident) such authority has been delegated to certain commanders in the field (44-441).

\* \* \* \*

*ARTICLE 120. COMMAND WHEN DIFFERENT CORPS OR COMMANDS HAPPEN TO JOIN. When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President.*

## ANNOTATION

1. Command, whether exercised directly or by delegation, must be exercised in accordance with law. The President may assume direct

command of troops if he so desires. In practice his authority to command is delegated to others through the general officers (12-264, 265).

2. The terms "rank" and "command" are neither convertible nor synonymous. Neither is "rank" the same as "office." A person may have rank without command. A staff officer, whatever his rank, is not empowered to exercise command in the line, but only in his own staff department, unless by specific assignment by the President. When a line officer is detailed to a staff department, or the general staff, his power to exercise command in the line is in abeyance during his tenure of staff office (12-263; 30-159, 160).

3. The assignment of an officer commissioned in a staff department to duty with a line branch by direction of the President will, in the absence of anything to the contrary in the order, entitle him to function in exactly the same manner as if commissioned in the line (30-159) (40-p. 979).

4. An officer of a staff corps or department is not eligible for detail as officer of the day in a command including members of branches other than his own (30-159) (40-p. 979). Officers commissioned in the Signal Corps or Corps of Engineers are officers of an arm, not "officers of any of the services", and therefore, unless "detailed for duty in any of the services", are eligible for detail as officer of the day (43-372).

5. An officer of the Marine Corps cannot exercise command in the army unless he is serving with the army by order of the President (12-179, 263).

6. The command of joint camps of instruction of the regular army and National Guard (when the guard is not in Federal service) remains with the senior officer of the regular army present, without regard to the rank of the senior officer of the National Guard (12-179, 180).

7. A line officer serving as a transport quartermaster, but not under detail to the Quartermaster Corps, succeeds to the command of troops on board if he is the senior officer present (12-271).

\* \* \* \*

*ARTICLE 121. COMPLAINTS OF WRONGS. Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the officer exercising general court-martial jurisdiction over the officer against whom the complaint is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the*



*Department of the Army a true statement of such complaint, with the proceedings had thereon.* (As amended by S.S.A. '48, effective Feb. 1, 1949).

#### ANNOTATION

1. The right conferred by this Article cannot be restricted nor prejudiced by regulations (12-126). The statute of limitations (Article 39) does not apply to complaints hereunder (12-579).

2. The "wrongs" here contemplated are those only which emanate from the complainant's commanding officer (30-1245) (40-479).

3. Facts entered upon an efficiency report do not constitute a "wrong" within the sense of this Article unless it is clearly shown that such report was malicious and not dictated by a true sense of duty (12-125).

4. A commanding officer cannot be brought to account under this Article for disciplinary action taken by him unless he has exceeded the proper bounds of his authority or discretion (30-1245) (40-427 [1]).

5. A complaint against close arrest, and request for an extension of its limits for the purpose of needed physical exercise, should be forwarded by the local commander to higher authority for consideration and appropriate action (30-Sup. 1245) (40-479).

## GLOSSARY OF LEGAL TERMS

Affirmatively shown—Positively stated, not left to inference.

*Aliunde*—From another source.

Amenable—subject, or liable.

Collaterally attacked—As applied to a court martial record, means a claim of some irregular or illegal procedure not shown by the record.

Constructive notice—Legal presumption that actual notice was received.

Constructive remission of a sentence—Action which, in legal effect, amounts to, or causes, a remission of the sentence.

Constructively enlisted—Legally regarded as in the military service, though not formally enlisted.

Constructively pardoned—Legally presumed to have been pardoned, though no formal pardon was issued.

Continuance—As applied to court martial proceedings, means a postponement of the trial.

*Corpus delicti*—The basic facts constituting the crime charged, as, in murder, the actual death of the person alleged to have been murdered, or in larceny, the actual loss of the property alleged to have been stolen.

*Duces tecum*—A summons to produce books, records, or other documentary evidence.

*Ex parte*—In the interest of one side only.

Fatal error—An error or omission in court martial pleadings or procedure sufficient to invalidate the trial.

*Flagrante delicto*—In the very act.

*Habeas corpus*—A writ to bring the party before a civil court for inquiry into the legality of his restraint or detention.

Improper action—Incorrect procedure. It may or may not be fatal or prejudicial as the terms are herein defined.

Letters rogatory—A request by a court to a court in another jurisdiction that a witness be examined upon interrogatories sent with the request.

Mesne process—A writ by which a civil suit is commenced.

Military jurisdiction—Military control or authority. The phrase “amenable, or subject to, military jurisdiction” means subject to military law including trial by court martial.

Motion to sever—In a joint trial, is a motion made by one of the accused for a separate trial.

*Nolle prosequi*—Not to prosecute, or be prosecuted.

Parol evidence—Oral testimony.

*Per se*—In, or of, itself.

Prejudicial error—An error in court martial procedure which injuriously affects the substantial rights of the accused. See Article 37.

*Prima facie*—On its face; *prima facie* evidence is evidence sufficient to establish a fact unless rebutted.

*Pro forma*—As a matter of form.

*Pro rata*—In proportion.

*Res adjudicata*, or *judicata*—A fact, or case, already decided judicially.

*Sine die*—Without date.

Statute of limitations—The limitations upon prosecutions imposed by Article 39 (As to time) and Article 40 (As to number). It may be pleaded specially, but it is also an available defense under the general issue.

# INDEX

(References are, Column 1 to the Articles of War, and Column 2 to paragraphs of Annotations thereunder).

## A

|   | <i>Art.</i> | <i>Pars.</i> |
|---|-------------|--------------|
| ABANDONED PROPERTY, DEALING IN .....  | 80          | 2-6          |
| ABSENCE WITHOUT LEAVE .....   | 61          | 1-28         |
| Capture by enemy during, returns soldier to duty status   | 61          | 3            |
| Change of organization during .....   | 61          | 6            |
| Computation of period of .....  | 61          | 23           |
| Disability incurred while, does not change status .....   | 61          | 2            |
| Forfeiture of pay during .....  | 61          | 11-12        |
| How terminated .....  | 61          | 5-5b         |
| In hands of civil authorities .....   | 61          | 7-9          |
| Obligation to return from .....   | 61          | 1            |
| Other offenses involved .....   | 61          | 13-17        |
| Proof of .....  | 61          | 18-22a       |
| Punishment .....  | 61          | 24-28        |
| Reporting for transportation back to station does not<br>change status .....                          | 61          | 4            |
| Restoration to duty without trial .....   | 61          | 10           |
| To avoid hazardous duty or shirk important service, pun-<br>ishable as desertion .....                | 28          | 5-8          |
| ACCOMPLICE, TESTIMONY OF .....  | 37          | 45-46        |
| ACCUSED:  |             |              |
| Arraignment of, essential (See Pleas before Courts-martial)   | 21          | 1-4          |
| Change of plea .....  | 21          | 18-22        |
| Character of, cannot be attacked unless defense puts it<br>in issue .....                             | 37          | 54-55        |
| Compulsory self-incrimination prohibited (See Confessions)  | 24          | 1-20         |
| Death of, before final action on case, abates proceedings   | 37          | 17a          |
| Entitled to copy of charges .....   | 37          | 73           |
|   | 46          | 16           |
| Entitled to copy of record of trial .....   | 111         | 1            |
| Entitled to counsel .....   | 11          | 12-16        |
|   | 17          | 9-16         |
| Errors in procedure not fatal unless prejudicial to sub-<br>stantial rights of .....                  | 37          | 1-81         |
| Failure to advise, as to effect of plea of guilty, or errone-<br>ous explanation .....                | 21          | 3            |
|   | 37          | 71, 76       |
|   | 45          | 17           |
| Faulty description of, in charges .....   | 37          | 35-36        |
| Has right to present written statement .....  | 37          | 68           |
| Need not be in arrest or confinement .....  | 69          | 2            |
| Not to be prejudiced by refusal of joint offender to tes-<br>tify because of self-incrimination ..... | 24          | 4a           |
|   | 37          | 48a          |
| Presence during trial .....   | 17          | 13           |
| Refusal or failure to plead .....   | 21          | 16           |
|   | 37          | 18           |
| Restraint during trial .....  | 17          | 12           |
|   | 69          | 2            |

|   | <i>Art.</i> | <i>Pars.</i> |
|---|-------------|--------------|
| Right to counsel .....  | 17          | 9-16         |
| Statute of limitations, must be advised of right to plead .....   | 37          | 39           |
| Witness, rights as, must be explained to .....  | 37          | 69           |
| ACCUSER DISQUALIFIED TO CONVENE COURT OR SIT AS MEMBER .....  | 4           |              |
|   | 8           |              |
| AIDING THE ENEMY .....  | 81          | 1-9          |
| AIR FORCE, members of subject to Articles of War, but not to trial by Army courts-martial .....                                 | 2           | 4a           |
| Not eligible to sit as members of Army Courts-Martial ..  | 4           |              |
| ALLIED FORCES, MEMBERS OF MAY BE CONFINED BY U. S. MILITARY AUTHORITIES, WHEN .....   | 2           | 1a           |
|   | 71          | 2            |
| Surrender of deserter to .....  | 74          | 13           |
| AMERICAN RED CROSS PERSONNEL, SUBJECT TO MILITARY LAW, WHEN .....   | 2           | 25           |
| APPELLATE REVIEW OF COURTS-MARTIAL PROCEEDINGS .....  | 50          |              |
| ARREST OF CIVILIANS BY MILITARY AUTHORITIES:  |             |              |
| When detected in commission of felony or breach of peace .....  | 68          | 2            |
| When unlawfully wearing Army uniform .....  | 68          | 6            |
| ARREST OF DESERTERS BY CIVIL OFFICIALS .....  | 106         | 1-7          |
| ARREST OF PERSONS ENGAGED IN QUARRELS, FRAYS OR DISORDERS .....   | 68          | 1-6          |
| ARREST OR CONFINEMENT OF MILITARY PERSONS CHARGED WITH CRIME OR SERIOUS VIOLATIONS OF ARTICLES OF WAR .....                     | 69          | 1-35         |
| Awaiting trial or result of trial, no punishment except confinement .....   | 16          |              |
|   | 69          | 1a           |
| Breach of arrest or restriction .....   | 69          | 20-23a       |
| Delegation to noncommissioned officers of power to arrest or confine enlisted men .....   | 69          | 14-15        |
| Escape from confinement .....   | 69          | 24-31a       |
| Escape of prisoner, allowing .....  | 73          | 1-2          |
| Forceable entry by military authorities into private dwelling to arrest soldier, not authorized .....                           | 69          | 9            |
| Force used in making arrest .....   | 69          | 8            |
| Joint escape .....  | 69          | 29-29a       |
| Legality of arrest or confinement presumed .....  | 69          | 15           |
| Members of allied forces, when .....  | 2           | 1a           |
|   | 71          | 2            |
| Not necessary that accused be in arrest or confinement ..   | 69          | 2            |
| Officer in, may prefer charges .....  | 46          | 1            |
| Release from arrest or confinement .....  | 69          | 32-35        |
| Failure to prefer charges does not authorize person to release himself .....  | 69          | 13           |
| When trial delayed .....  | 69          |              |
| Restraint authorized in maintenance of discipline .....   | 69          | 1            |
| Shooting escaping prisoner .....  | 69          | 30           |
| Soldier extradited from foreign country for civil offense cannot be arrested by military authorities for military offense ..... | 69          | 4            |

# INDEX

39

|   | Art. | Pars.  |
|---|------|--------|
| Soldier on parole or bail from civil court may be arrested<br>for military offense .....                        | 69   | 5      |
| Status of arrest, limits, restrictions .....  | 69   | 16-19  |
| Suspension from duty and pay does not imply arrest ....   | 69   | 7      |
| Who may order persons into .....  | 69   | 11-15  |
| ARTICLES OF WAR:  |      |        |
| Persons subject to .....  | 2    | 1-34   |
| To be read and explained .....  | 110  |        |
| ASSAULT:  |      |        |
| With intent to commit a felony .....  | 93   | 1-11   |
| With intent to do bodily harm .....   | 93   | 12-20  |
| ASSAULTING OR DISOBEYING NONCOMMISSIONED<br>OFFICER .....   |      |        |
|   | 65   | 1-7    |
| ASSAULTING OR WILFULLY DISOBEYING SUPERIOR<br>OFFICER .....   |      |        |
|   | 64   | 1-24   |
| Allegations and proof .....   | 64   | 17-21  |
| Assaulting commanding officer .....   | 64   | 2-2a   |
| Disobedience of lawful command .....  | 64   | 3-13   |
| Other offenses involved .....   | 64   | 14-16a |
| Penalty .....   | 64   | 22-24  |
| "Superior officer," meaning of term .....   | 64   | 1-1b   |
| ASSISTANT TRIAL JUDGE ADVOCATE AND ASSISTANT<br>DEFENSE COUNSEL, POWERS OF .....                                |      |        |
|   | 116  |        |
| AVIATION CADETS, DISCHARGE OF (See Soldiers, Sepa-<br>ration from the Service)                                  |      |        |
| B   |      |        |
| BAD CONDUCT DISCHARGE .....   |      |        |
|   | 12   |        |
|   | 13   |        |
|   | 108  | 12     |
| BOARDS OF REVIEW, APPOINTMENT AND FUNC-<br>TIONS .....  |      |        |
|   | 50   |        |
| BREACH OF ARREST OR RESTRICTION .....   |      |        |
|   | 69   | 20-23a |
| BURGLARY .....  |      |        |
|   | 93   | 51-54  |
| C   |      |        |
| "CADET," AS USED IN ARTICLES OF WAR, APPLIES<br>ONLY TO CADETS OF THE U. S. MILITARY ACA-<br>DEMY .....         |      |        |
|   | 2    | 15     |
| CAPTURED PROPERTY:  |      |        |
| Dealing in .....  | 80   | 1      |
| Disposition of .....  | 79   | 1-6    |
| CHALLENGES, MEMBERS OF GENERAL AND SPECIAL<br>COURTS .....  |      |        |
|   | 18   | 1-14   |
|   | 37   | 8-9    |
| CHALLENGED MEMBER SHOULD NOT PARTICIPATE<br>IN PROCEEDINGS ON CHALLENGE .....                                   |      |        |
|   | 37   | 8      |
| CHARGES, ACTION UPON .....  |      |        |
|   | 46   |        |
| Court or Trial Judge Advocate cannot make substantial<br>changes in, without direction from convening authority | 46   | 18     |
| Form and contents .....   | 37   | 28-33  |
|   | 46   | 6-9b   |

|  | Art. | Pars.              |
|--|------|--------------------|
| Investigating officer may testify on trial as to statements of accused .....                           | 46   | 15                 |
| Investigation .....  | 46   | 11-15              |
| Joint charges, when proper .....   | 46   | 9                  |
| Laid under wrong Article, not fatal error .....  | 37   | 35 <sup>a</sup>    |
| Multiplication of .....  | 46   | 6a-6b              |
| Must be signed by person subject to military law .....   | 46   | 1                  |
| New charges cannot be added after arraignment of accused .....   | 46   | 18                 |
| Not signed, pleading general issue waives objection .....  | 46   | 5                  |
| Oath to, may be waived by accused .....  | 46   | 10                 |
| Reference to staff judge advocate .....  | 47   | 4                  |
| Reference for trial .....  | 47   | 2-5                |
| Service on accused .....   | 37   | 73                 |
|  | 46   | 16-21              |
| Specifications cannot be amended on trial to charge a different offense not included in original ..... | 46   | 19                 |
| Unnecessary delay prohibited .....   | 70   |                    |
| Who may prefer .....   | 46   | 1-5                |
| CIRCUMSTANTIAL EVIDENCE, WHEN SUFFICIENT TO CONVICT .....  | 37   | 40a                |
| CIVILIANS, MAY BE ARRESTED BY MILITARY AUTHORITIES, WHEN .....   | 68   | 2, 6               |
| Subject to trial by court-martial, when .....  | 2    | 19-27              |
| CIVIL AUTHORITIES, DELIVERY OF OFFENDERS TO ..   | 74   | 1-43               |
| Arrest of civilians residing on military posts .....   | 74   | 9                  |
| Attendance as witnesses in civil courts .....  | 74   | 30-30a             |
| Deserters .....  | 74   | 40                 |
| Extradition of soldiers .....  | 74   | 32-33              |
| For crime committed before entry into military service ..  | 74   | 2                  |
| Habeas corpus .....  | 74   | 34-39 <sup>a</sup> |
| In general .....   | 74   | 1-9                |
| "Laws of the land," meaning of .....   | 74   | 3                  |
| Offenses committed on Army transports .....  | 74   | 28-29              |
| Service of process in civil suits .....  | 74   | 41-43              |
| When already tried by court-martial .....  | 74   | 31                 |
| When surrender may be refused .....  | 74   | 10-27              |
| Crime committed on military reservation .....  | 74   | 19-27              |
| In time of war .....   | 74   | 10-13              |
| When military jurisdiction has attached .....  | 74   | 14-16              |
| Military prisoners .....   | 74   | 17-18              |
| When warrants issued by both Federal and State courts .....  | 74   | 4-5                |
| CIVIL SUITS, REMOVAL OF FROM STATE TO FEDERAL COURTS .....   | 117  | 1                  |
| COMPANY PUNISHMENT (See Disciplinary Powers of Commanding Officers)                                    |      |                    |
| COMPELLING COMMANDER TO SURRENDER .....  | 76   |                    |
| COMPLAINTS OF WRONGS .....   | 121  |                    |
| COMPULSORY SELF-INCRIMINATION PROHIBITED ..  | 24   | 1-20               |
| (See Confessions)  |      |                    |
| CONDUCT OF A NATURE TO BRING DISCREDIT ON THE MILITARY SERVICE .....                                   | 96   | 8-15a              |

|  | Art.    | Pars.             |
|--|---------|-------------------|
| CONDUCT TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE .....   | 96      | 4-7a              |
| CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN .....  | 95      | 1-33              |
| Cheating .....   | 95      | 11-12             |
| Domestic relations .....   | 95      | 30-33             |
| Drunkenness and disorderly conduct .....   | 95      | 13-15a            |
| False official statements .....  | 95      | 25-29b            |
| Financial affairs .....  | 95      | 16-24a            |
| In general .....   | 95      | 1-6h              |
| Relations with officers and men .....  | 95      | 7-10a             |
| CONFESSIONS .....  | 24      | 5-13              |
| Alone will not support conviction .....  | 37      | 47-53             |
| Obtained by improper means, cannot be used .....   | 37      | 50, 50a, 51b, 52b |
| Of joint offenders .....   | 24      | 11a               |
| CONFINEMENT, AUTHORIZED PLACES OF .....  | 42      | 1-16              |
| Regulations as to, pending trial or result of trial .....  | 16      |                   |
| CONFIRMATION OF COURT-MARTIAL PROCEEDINGS, WHEN REQUIRED AND BY WHOM .....                                     | 48      |                   |
| CONSPIRATORS, ACTS AND STATEMENTS OF .....   | 24      | 14-16             |
| CONTINUANCES OF PROCEEDINGS OF COURTS-MARTIAL .....  | 20      | 1-3               |
| Motion for, should be granted when .....   | 37      | 73-74a            |
| CORPUS DELICTI, NECESSITY FOR PROOF OF .....   | 37      | 47-49             |
| COUNTERSIGN, IMPROPER USE OF .....   | 77      |                   |
| COURTS-MARTIAL (See also specific references to General, Special, and Summary Courts-martial)                  |         |                   |
| Absence of member .....  | 37      | 4, 6              |
| Action, announcement of .....  | 29      | 1-2               |
| Cannot dissolve itself .....   | 20      | 3                 |
| Contempts .....  | 32      | 1-5               |
| Continuances .....   | 20      | 1-3               |
| Errors in procedure not fatal unless prejudicial to substantial interest of accused (See Irregularities) ..... | 37      | 1-81              |
| Judicial notice, matters subject to .....  | 38      | 6-7               |
| Kinds of .....   | 3       |                   |
| May exclude disorderly persons .....   | 32      | 4                 |
| May sit with closed doors, but are usually open .....  | 38      | 3                 |
| Member cannot sit on, when in arrest .....   | 69      | 6                 |
| Number of members required .....   | 5, 6, 7 | 1-5               |
| Persons subject to trial by (See Military Law, Persons subject to) .....                                       | 2       | 1-34              |
| Punishments, restrictions .....  | 41      | 1-10              |
| Reconsideration of findings and sentence .....   | 29      | 2                 |
| Records, presumption as to validity .....  | 37      | 1                 |
| Reporters and interpreters for .....   | 115     | 1-6               |
| Rules of procedure, prescribed by The President .....  | 38      |                   |
| Senior member is president of, authority .....   | 4       | 1-2               |



|   | <i>Art.</i> | <i>Pars.</i> |
|---|-------------|--------------|
| <b>Sentences:</b>   |             |              |
| Mitigation, remission, commutation .....  | 51          |              |
| Suspension of, in general .....   | 51          |              |
| Unlawfully influencing .....  | 88          |              |
| Who may serve on .....  | 4, 16       | 1-16         |
| Witnesses .....   | 22          |              |
|   | 23          |              |
| <b>COURTS-MARTIAL PROCEEDINGS, ACTION ON:</b>                                       |             |              |
| By convening authority .....  | 47          |              |
| Confirmation, when required .....   | 48          |              |
| Powers incident to approval .....   | 47          |              |
| Powers incident to confirmation .....   | 49          |              |
| <b>COURTS OF INQUIRY:</b>   |             |              |
| Challenges .....  | 99          | 1            |
| Composition .....   | 98          | 1            |
| Oaths of members and recorder .....   | 100         |              |
| Opinion on merits of case .....   | 102         | 1-3          |
| Powers and procedure .....  | 101         | 1-6          |
| Records .....   | 103         | 1            |
| When admissible in evidence before courts-martial ..                                | 27          | 1            |
| When and by whom appointed .....  | 97          | 1-5          |
| <b>CRIMES AND OFFENSES NOT CAPITAL (General Article)</b>                            | 96          | 16-20a       |
| <b>CUMULATIVE SENTENCES</b> .....   | 41          | 10           |
| <b>D</b>  |             |              |
| <b>DAMAGE TO MILITARY PROPERTY, LIABILITY FOR ..</b>                                | 83          | 1-9          |
| <b>DAMAGE TO PROPERTY OF PERSONS (See Injuries to<br/>Property, Redress of)</b>     |             |              |
| <b>DEATH SENTENCE, WHEN LAWFUL</b> .....  | 43          | 1-5          |
| <b>DEBTS DUE DECEASED SOLDIERS, COLLECTION OF ..</b>                                | 112         | 7            |
| <b>DECEASED PERSONS, DISPOSITION OF EFFECTS OF ....</b>                             | 112         | 1-20         |
| Debts due .....   | 112         | 7            |
| In general .....  | 112         | 1-5          |
| Persons entitled to effects .....   | 112         | 8-13         |
| Property subject to lien .....  | 112         | 19-19a       |
| To what property applicable .....   | 112         | 6-6a         |
| Transportation .....  | 112         | 20           |
| When not claimed, or when claims conflicting .....                                  | 112         | 14-18a       |
| <b>DEFENSE COUNSEL:</b>   |             | 12-16        |
| Appointment of, qualifications .....  | 11          | 8-13         |
| Assistant, powers of .....  | 116         |              |
| Cannot incriminate accused without his consent .....                                | 24          | 20           |
| Duties of .....   | 17          | 9-14, 17, 18 |
| Not subject to challenge by prosecution .....                                       | 18          | 5            |
| Selection of .....  | 17          | 15-16        |
| <b>DEFINITIONS OF CERTAIN TERMS USED IN THE<br/>ARTICLES OF WAR</b> .....           | 1           |              |
| <b>DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES<br/>(See Civil Authorities)</b> ..... | 74          | 1-43         |

|   | Art. | Pars.  |
|---|------|--------|
| <b>DEPOSITIONS:</b>   |      |        |
| Before whom taken .....   | 26   | 1-3    |
|   | 114  | 12-13  |
| Unsigned, not admissible .....  | 31   | 6      |
| When admitted in evidence are part of the record, and<br>loss of, before final action on case, invalidates the pro-<br>ceedings ..... | 37   | 81     |
| When admissible .....   | 25   | 1-7    |
| <b>DESERTION:</b>   |      |        |
| Acts which constitute .....   | 28   | 1-7    |
|   | 58   | 1-10   |
|   | 61   | 1      |
| Administrative determination of .....   | 58   | 6      |
| Aiding or advising .....  | 59   | 1-3    |
| Allegations and proof .....   | 58   | 26-39b |
|   | 28   | 8-10   |
| Arrest of deserters by civil authorities .....  | 106  | 1-7    |
| Attempt to desert .....   | 58   | 42-44a |
| Civil disabilities .....  | 58   | 70-74  |
| Conviction of absence without leave only on trial for<br>desertion is an acquittal of desertion .....                                 | 58   | 11     |
| Deserter from allied force, surrender of .....  | 74   | 13     |
| Drafted men .....   | 58   | 54-58  |
| From fraudulent enlistment .....  | 58   | 14, 17 |
| From constructive enlistment .....  | 58   | 15     |
| General prisoner under suspended dishonorable discharge   | 58   | 16     |
| National Guard and volunteers .....   | 58   | 59-63  |
| Not a joint offense .....   | 58   | 10, 38 |
| Officer failing to report deserter .....  | 60   |        |
| Punishment .....  | 58   | 64-69  |
| Recruit accepted but not yet enlisted, cannot be tried for  | 58   | 13     |
| Removal of charge .....   | 58   | 17-25  |
| Restoration to duty without trial, or trial for absence<br>without leave only, eliminates charge of desertion ....                    | 58   | 12     |
| Variance between allegations and proof .....  | 58   | 40-41a |
| War-time .....  | 58   | 45-53  |
| <b>DISCHARGE OF SOLDIER:</b>  |      |        |
| Does not terminate jurisdiction over military prisoner ..   | 2    | 30-33  |
| In general, terminates court-martial jurisdiction, Ex-<br>ceptions .....  | 2    | 2-6    |
| (See Soldiers, Separation from Service)   |      |        |
| <b>DISCIPLINARY POWERS OF COMMANDING OFFICERS ..</b>  | 104  | 1-18   |
| Appeals from .....  | 104  | 14-15  |
| Applicable to minor offenses only .....   | 104  | 3-3a   |
| In general .....  | 104  | 1-2    |
| Punishments authorized .....  | 104  | 7-13   |
| Restraint authorized in maintenance of discipline .....   | 69   | 1      |
| Subsequent trial .....  | 104  | 16-18  |
| Who may administer .....  | 104  | 4-6d   |
| <b>DISHONORABLE DISCHARGE:</b>  |      |        |
| May be imposed with life imprisonment .....   | 92   | 8      |
| Sentence of, suspension .....   | 51   |        |
| (See Soldiers, Separation from Service)   |      |        |

|   | Art. | Pars. |
|---|------|-------|
| DISMISSAL OF OFFICERS .....   | 118  | 7-12b |
| (See Officers, Separation from Service)   |      |       |
| DISOBEDIENCE OF SUPERIOR OFFICER .....  | 64   | 1-24  |
| (See Assaulting or Wilfully Disobeying Superior Officer)  |      |       |
| DISOBEDIENCE OF NONCOMMISSIONED OFFICER ....  | 65   | 1-7   |
| (See Assaulting or Disobeying Noncommissioned Officer)  |      |       |
| DISRESPECT TOWARD THE PRESIDENT, ETC. ....  | 62   | 1     |
| DISRESPECT TOWARD SUPERIOR OFFICER .....  | 63   | 1-5   |
| DOCUMENTARY EVIDENCE .....  | 37   | 57-61 |
| DOUBLE JEOPARDY:  |      |       |
| Acquittal sometimes a good defense in trial for another offense, although not a bar to the second trial ..... | 40   | 13    |
| Case erroneously disapproved by reviewing authority is nevertheless a bar to second trial .....               | 40   | 9     |
| Reconsideration, restrictions .....   | 40   | 21-24 |
| Right to plead may be waived .....  | 40   | 1     |
| Same offense .....  | 40   | 10-12 |
| Trial by both military and civil courts .....   | 40   | 17-20 |
| What constitutes .....  | 40   | 2-8a  |
| Withdrawal, discontinuance, or mistrial, not a bar to second trial .....                                      | 40   | 14-16 |
| DRAFTED MEN, SUBJECT TO MILITARY LAW, WHEN  | 2    | 12-14 |
| DRUNK ON DUTY .....   | 85   |       |
| "Drunkenness" defined .....   | 85   | 1-2   |
| "On duty" defined .....   | 85   | 3-7   |
| Punishment .....  | 85   | 10-11 |
| Specifications .....  | 85   | 9     |
| DRUNK ON POST (See Sentinel, Misbehavior of)  |      |       |
| DUELING .....   | 91   | 1     |
| E   |      |       |
| EFFECTS OF DECEASED PERSONS (See Deceased Persons, Disposition of effects of)                                 |      |       |
| EMBEZZLEMENT, IN GENERAL .....  | 93   | 21-33 |
| Of Government property .....  | 94   |       |
| ENEMY, CAPTURE BY, TERMINATES STATUS OF ABSENCE WITHOUT LEAVE .....   | 61   | 3     |
| ENEMY, RELIEVING, CORRESPONDING WITH, OR AIDING .....   | 81   | 1-9   |
| ENLISTED PERSONS MAY SERVE ON COURTS-MARTIAL, WHEN .....  | 4    |       |
|   | 16   |       |
| ENLISTMENT:   |      |       |
| Fraudulent .....  | 54   | 1-19  |
| Oath of .....   | 109  | 1-5   |
| Persons prohibited from .....   | 55   | 1-2   |
| "ENTRAPMENT", GOOD DEFENSE, WHEN .....  | 37   | 2-2a  |
| ERRORS IN COURTS-MARTIAL PROCEEDINGS .....  | 37   |       |
| (See Irregularities in Courts-martial Procedure)  |      |       |

|  | Art. | Pars.     |
|--|------|-----------|
| ESCAPE FROM CONFINEMENT .....  | 69   | 24-31a    |
| EVIDENCE IN COURTS-MARTIAL:  |      |           |
| Accomplice, testimony of .....   | 37   | 45-46     |
| Accused must be advised of his right to testify .....                              | 37   | 69        |
| Admission of improper, not necessarily fatal .....                                 | 37   | 41        |
| Articles seized without a warrant, not admissible .....                            | 37   | 64        |
| As to bad character of accused, not admissible unless he<br>puts it in issue ..... | 37   | 54-55     |
| Circumstantial, when sufficient to support conviction ....                         | 37   | 40a       |
| Compulsory self-incrimination prohibited .....                                     | 24   | 1-20      |
| Confessions .....  | 24   | 5-13      |
| Conspirators, acts and statements of .....   | 37   | 47-53     |
| Documentary, authentication, value, etc. ....                                      | 24   | 14-16     |
| Hearsay and opinion .....  | 37   | 57-61     |
| Investigating officer may testify to statements of accused                         | 46   | 60-63a    |
| Joint offenders, testimony of .....  | 15   |           |
| Judicial notice, matters subject to .....  | 24   | 11a       |
| May be introduced out of usual order in court's discretion                         | 38   | 6-7       |
| Purpose of, may be limited by proper instructions of<br>law member .....           | 38   | 5         |
| Records of courts of inquiry, when admissible .....                                | 37   | 54a       |
| Rules of, in general .....   | 27   | 1         |
| President may prescribe .....  | 37   | 40-44     |
| Variance between allegations and proof .....                                       | 38   | 1-7       |
| EXTRADITION OF SOLDIERS .....  | 37   | 34-36, 43 |
|  | 69   | 4         |
|  | 74   | 32-33     |
| <b>F</b>   |      |           |
| FALSE CLAIMS AGAINST THE GOVERNMENT .....  | 94   | 1-4       |
| FALSE MUSTER .....   | 56   |           |
| FALSE RETURNS .....  | 57   | 1         |
| FAMILY ALLOWANCES, WHETHER EXEMPT FROM<br>FORFEITURE .....                         | 45   | 15        |
| FELONY, DEFINED .....  | 55   | 2         |
| FLIGHT OFFICER, not a commissioned officer .....                                   | 1    | 1         |
| Termination of appointment .....   | 2    | 2a        |
| FORCING A SAFEGUARD .....  | 78   | 1         |
| FORFEITURES, LIMITS OF, ETC. ....  | 45   | 10-15     |
| FORGERY .....  | 93   | 34-50     |
| FRAUDS AGAINST THE GOVERNMENT .....  | 94   |           |
| Embezzlement of Government property .....  | 94   |           |
| False claims .....   | 94   | 1-4       |
| False oaths .....  | 94   |           |
| Liability for, after separation from service .....                                 | 94   | 33-38     |
| Stealing, etc., of Government property .....                                       | 94   | 5-27      |
| FRAUDULENT ENLISTMENT:   |      |           |
| In general .....   | 28   | 4         |
| Proof .....  | 54   | 1-9       |
| Specifications .....   | 54   | 11-18     |
| Variance between allegations and proof .....                                       | 54   | 10        |
|  |      | 19        |

|   | Art.   | Pars.  |
|---|--------|--------|
| Voidable only at option of Government .....                                   | 2      | 3      |
|   | 54     | 5      |
| <b>G</b>  |        |        |
| GENERAL ARTICLE .....   | 96     | 1-26   |
| Application of, in general .....  | 96     | 1-3b   |
| Conduct of a nature to bring discredit upon the mili-<br>tary service .....   | 96     | 8-15a  |
| Conduct to the prejudice of good order and military<br>discipline .....       | 96     | 4-7    |
| Crimes and offenses not capital .....   | 96     | 16-20a |
| Specifications .....  | 96     | 3      |
| Substitution for other Articles .....   | 96     | 21-26  |
| <b>GENERAL COURTS-MARTIAL:</b>  |        |        |
| Announcement of action .....  | 29     | 1-2    |
| Appellate review of proceedings .....   | 50     |        |
| Appointed by whom .....   | 8      |        |
| Challenges against members .....  | 18     |        |
|   | 37     | 8-9    |
| Charges (See Charges, Action upon)  |        |        |
| Closed sessions .....   | 30     | 1-2    |
| Convening order .....   | 8      | 4-6    |
|   | 37     | 75     |
| Death sentence, or imprisonment for more than ten years,<br>when lawful ..... | 43     | 1-5    |
| Dissolution of .....  | 8      | 10-12  |
|   | 20     | 3      |
| Jurisdiction .....  | 12     |        |
| As to persons, in general .....   | 2      | 1-34   |
| Civilians accompanying, or serving with, the Army ..                          | 2      | 19-27  |
| Offenses committed before entering military service ..                        | 2      | 1      |
| Offenses committed in different military status .....                         | 2      | 4      |
|   | 45     | 10a    |
| Offenses committed in prior enlistment .....                                  | 2      | 5      |
| Offenses outside the jurisdiction of inferior courts ..                       | 13, 14 | 3-5    |
| Prisoners of war and internees .....  | 2      | 28-29  |
| Requirements necessary to vest .....  | 12     | 8-13   |
| Restrictions .....  | 12     | 14     |
| Law member, appointment essential, qualifications .....                       | 8      | 27-28  |
| Duties and authority .....  | 31     |        |
| Members must be sworn .....   | 19     | 2      |
| Oaths of personnel and witnesses .....  | 19     | 1-11   |
| Persons disqualified as members .....   | 4      | 10-16  |
| President of court, authority .....   | 4      | 2      |
| Proceedings, action on:   |        |        |
| By convening authority .....  | 47     |        |
| Confirmation, when required, by whom .....                                    | 48, 49 |        |
| Restrictions .....  | 50     |        |
| Reconsideration of findings and sentence .....                                | 29     | 2      |
|   | 33     | 5      |
|   | 40     | 21-24  |
| Records .....   | 33     | 1-21   |
| Authentication .....  | 33     | 8-13   |
| Action on, by reviewing authority .....                                       | 47     |        |
| Reference to staff J. A. ....   | 47     | 10-11a |

|   | Art. | Pars.  |
|---|------|--------|
| Powers incident to approval .....   | 47   | 20-39a |
| Promulgating order .....  | 47   | 14-18  |
| Finality of .....   | 47   | 40-42  |
| Appellate review in J. A. G. O. ....  | 50   |        |
| Copy of, each accused entitled to .....   | 111  |        |
|   | 35   | 1      |
| Correction of .....   | 33   | 7      |
| Destruction or loss, effect .....   | 33   | 14-15a |
|   | 47   | 19     |
| Disposition of .....  | 35   | 1      |
| Presumption of validity .....   | 37   | 1      |
| Reviewing authority cannot correct .....  | 47   | 27     |
| Revision .....  | 33   | 16-21  |
| Relief or addition of members .....   | 4    | 5      |
|   | 8    | 7-9    |
|   | 37   | 4-7    |
| Sentences, confirmation required, when .....  | 48   |        |
| Sentences, mitigation, remission, commutation .....                                 | 51   |        |
| Sentence to confinement for more than ten years, or death, vote requisite for ..... | 43   | 3-4    |
| Suspension of sentences of dismissal or death .....                                 | 51   | 1      |
| Trial judge advocates and counsel for defense, appointment and duties .....         | 11   |        |
|   | 17   |        |
|   | 116  |        |
| Viewing premises where crime committed .....  | 38   | 5a     |
| Vote necessary for conviction .....   | 43   | 4a     |
| Voting, method of .....   | 31   | 1-3    |
| Who may serve on .....  | 4    |        |
| Witnesses .....   | 22   | 1-6    |
|   | 23   | 1-6    |
| GENERAL PRISONERS, RESTORATION TO DUTY OR REENLISTMENT OF .....                     | 51   |        |
| GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED .....                              | 89   |        |
| (See Injuries to Property)  |      |        |

H

|   |     |        |
|---|-----|--------|
| HABEAS CORPUS, WRITS OF .....                                     | 74  | 34-39a |
| HEARSAY EVIDENCE, DEFINITION .....                                | 37  | 60     |
| Conviction based solely upon, cannot be sustained .....           | 37  | 62     |
| HONORABLE DISCHARGE (See Soldiers, Separation from Service) ..... | 108 | 4-10   |
| HOUSE-BREAKING .....  | 93  | 51-54  |

I

|   |     |       |
|---|-----|-------|
| INJURIES TO PROPERTY, REDRESS OF .....                              | 105 | 1-22  |
| Application of Article, in general .....                            | 105 | 1-8   |
| Assessment not collected, officer responsible therefor liable ..... | 105 | 20    |
| Board's award conclusive .....                                      | 105 | 15-18 |
| Claims and claimants .....  | 105 | 9-11  |

|  | <i>Art.</i> | <i>Pars.</i> |
|--|-------------|--------------|
| Collection in subsequent enlistment .....  | 105         | 21-22        |
| Damages .....  | 105         | 12           |
| Officer failing to take action on claim, liability .....   | 89          | 1-5          |
| Priority of claims allowed .....   | 105         | 19           |
| Pro rata assessment .....  | 105         | 13-14        |
| INQUESTS .....   | 113         | 1-3          |
| INSANITY, WHEN IN ISSUE ON TRIAL, PROCEDURE ..   | 37          | 70-70a       |
| When issue not raised in trial, discovery afterwards does<br>not affect legality of proceedings .....      | 37          | 78           |
| INSUBORDINATE CONDUCT TOWARDS NONCOMMIS-<br>SIONED OFFICER .....   | 65          | 1-7          |
| INTERNEES, SUBJECT TO TRIAL BY COURT-MARTIAL   | 2           | 28-29        |
| Penitentiary confinement authorized in proper case .....   | 42          | 2            |
| INTERPRETERS FOR COURTS-MARTIAL .....  | 115         | 1-6          |
| Oath of .....  | 19          |              |
| Who may be .....   | 37          | 25-26        |
| IRREGULARITIES IN COURTS-MARTIAL PROCEDURE:  |             |              |
| As to evidence .....   | 37          | 40-64        |
| As to personnel of court .....   | 37          | 4-27         |
| As to pleadings .....  | 37          | 28-39        |
| As to procedure .....  | 37          | 65-75        |
| As to sentence .....   | 37          | 76-78a       |
| As to the record .....   | 37          | 79-81        |
| Conviction not valid when accused was incited by Gov-<br>ernment agents to commit offense .....            | 37          | 2-2a         |
| Not fatal to proceedings unless record shows that sub-<br>stantial rights of accused were prejudiced ..... | 37          | 1-81         |
| Presumption of validity of proceedings, unless contrary<br>appears by the record .....                     | 37          | 1            |

## J

|  |                      |        |
|--|----------------------|--------|
| JOINT ESCAPE .....   | 69                   | 29-29a |
| JOINT OFFENDERS:   |                      |        |
| Acts and statements of .....   | 24                   | 14-16  |
| Confessions of .....   | 24                   | 11a    |
| Refusal to testify on ground of self-incrimination .....                                 | 24                   | 4a     |
| JOINT TRIAL:   |                      |        |
| Separate sentences should be adjudged .....  | 37                   | 77     |
| When proper or improper .....  | 37                   | 37-38  |
| JUDGE ADVOCATE GENERAL, FUNCTIONS OF, IN RE-<br>VIEW OF COURTS-MARTIAL PROCEEDINGS ..... | 47<br>48<br>49<br>50 |        |
| JUDGE ADVOCATES, ASSIGNMENT OF, CHANNELS OF<br>OF COMMUNICATION .....                    | 47                   | 1      |
| JUDICIAL NOTICE, MATTERS SUBJECT TO .....  | 38                   | 6-8    |
| JUDICIAL COUNCILS, Appt, functions .....   | 50                   |        |

## L

|                              |    |       |
|------------------------------|----|-------|
| LARCENY, IN GENERAL .....    | 93 | 55-73 |
| Of Government property ..... | 94 |       |

|   | Art. | Pars. |
|---|------|-------|
| <b>LAW MEMBER OF GENERAL COURT-MARTIAL:</b>   |      |       |
| Appointment, qualifications .....   | 8    | 27-28 |
| Cannot be challenged peremptorily .....   | 18   |       |
| Duties and authority .....  | 31   |       |
| <b>LIFE IMPRISONMENT, REQUISITE VOTE FOR .....</b>                                  | 43   | 3-4   |
| Sentence to, may include dishonorable discharge .....                               | 92   | 8     |
| <b>"LINE-OF-DUTY" CASES .....</b>   | 107  | 14-41 |
| <b>LIMITATIONS UPON PROSECUTIONS:</b>   |      |       |
| As to time .....  | 39   | 1-14  |
| Absence or impediment which prevents running of statute .....                       | 39   | 6-9   |
| Accused must be advised of right to plead the statute in proper case .....          | 37   | 39    |
| Being so advised, if not asserted it will be held waived .....                      | 39   | 2-3   |
| If plea not allowed, accused must have opportunity to offer defense on merits ..... | 39   | 2     |
| May be asserted by special plea or under general issue .....                        | 39   | 4     |
| Time of war .....   | 39   | 2     |
| When statute begins to run .....  | 39   | 11-14 |
| As to number (See Double Jeopardy)  |      | 10    |
| <b>LIMITATIONS UPON PUNISHMENTS .....</b>   | 45   | 1-20  |
| <b>LOSS, DAMAGE, OR WRONGFUL DISPOSITION OF MILITARY PROPERTY .....</b>             | 83   | 1-9   |

M

|   |    |        |
|---|----|--------|
| <b>MANSLAUGHTER .....</b>   | 93 | 74-74g |
| Voluntary .....   | 92 | 6b, 6c |
| <b>MARINES, WHEN SUBJECT TO MILITARY LAW .....</b>                  | 2  | 17-18  |
| <b>MILITARY COMMISSIONS .....</b>                                   | 15 | 1-9    |
| <b>MILITARY LAW, PERSONS SUBJECT TO:</b>                            |    |        |
| Army personnel .....  | 2  | 1-14   |
| After discharge .....   | 2  | 2, 5   |
| Drafted men .....   | 94 |        |
| Fraudulently enlisted .....   | 2  | 12-14  |
| National Guard .....  | 2  | 3      |
| Reserves .....  | 2  | 9-10   |
| Retired personnel .....   | 2  | 6-8    |
| Women's Army Corps .....  | 2  | 11     |
| Cadets, U. S. Military Academy .....                                | 2  | 5c     |
| Civilians accompanying or serving with the Army .....               | 2  | 15-16  |
| Members of other services attached to the Army .....                | 2  | 19-27  |
| Persons under court-martial sentence .....                          | 2  | 17-18  |
| Prisoners of war and internees .....                                | 2  | 5      |
| (See General Courts-Martial, Jurisdiction)                          |    | 30-33  |
| <b>MILITARY PRISONERS, SUBJECT TO TRIAL BY COURTS-MARTIAL .....</b> | 2  | 28-29d |
| Confinement with enemy, prohibited .....                            | 16 |        |
|   | 69 | 1a     |



|  | Art. | Pars.  |
|--|------|--------|
| May be held to serve sentences after expiration of enlistment and discharge .....                                | 2    | 30-32  |
| MILITARY PROPERTY, LOSS, DAMAGE, OR WRONGFUL DISPOSITION .....   | 83   | 1-9    |
| MILITARY PROPERTY ISSUED TO SOLDIERS, WASTE OR UNLAWFUL DISPOSITION .....  | 84   | 1-10   |
| MINOR, ENLISTMENT OF .....   | 55   | 1      |
| Serving in fraudulent enlistment is subject to trial by court-martial .....                                      | 2    | 3      |
| MISAPPROPRIATION OF GOVERNMENT PROPERTY ..   | 94   |        |
| MISBEHAVIOR OF SENTINEL .....  | 86   | 1-8    |
| MISBEHAVIOR BEFORE THE ENEMY .....   | 75   | 1-8    |
| MISCONDUCT, TIME LOST THROUGH, TO BE MADE UP   | 107  | 14-41  |
| MULTIPLE PUNISHMENTS, NOT TO BE IMPOSED ....   | 45   | 18     |
| MULTIPLICITY OF CHARGES .....  | 46   | 6a, 6b |
| MURDER .....   | 92   | 1-6k   |
| Attempt to murder .....  | 96   | 17b    |
| In trial for murder, evidence of character of victim not admissible when no basis for claim of self-defense .... | 37   | 56a    |
| Self-defense, sustained when .....   | 92   | 6f     |
| Statements of deceased, when admissible .....  | 37   | 62a    |
| MUTINY AND SEDITION .....  | 66   | 1-6    |
| Failure to suppress .....  | 67   |        |

## N

|  |    |       |
|--|----|-------|
| NATIONAL GUARD, MEMBERS OF, WHEN SUBJECT TO TRIAL BY COURT-MARTIAL ..... | 2  | 9-10  |
| Officers, eligibility for detail on courts-martial .....                 | 4  |       |
| NAVAL AND MARINE PERSONNEL, WHEN SUBJECT TO MILITARY LAW .....           | 2  | 17-18 |
| NEW TRIAL, PETITION FOR .....  | 53 |       |

## O

|   |     |        |
|---|-----|--------|
| OATH OF ENLISTMENT .....  | 109 | 1-5    |
| Not necessary to complete induction of drafted men ....         | 2   | 12a    |
|   | 109 | 3a     |
| OATHS, AUTHORITY TO ADMINISTER .....                            | 114 | 1-16   |
| Depositions .....   | 114 | 12-13  |
| Individuals authorized .....                                    | 114 | 4-7b   |
|   |     | 14-16  |
| In foreign places .....   | 114 | 10-11c |
| In general .....  | 114 | 1-3a   |
| Purposes authorized .....                                       | 114 | 8-9    |
| OATHS OF PERSONNEL OF COURTS-MARTIAL AND WITNESSES .....        | 19  | 1-12   |
| OFFICER, CONDUCT UNBECOMING (See Conduct Unbecoming etc.) ..... | 95  |        |
| Failing to report deserter .....                                | 60  |        |
| Failing to take action on claim for damage to property ..       | 89  | 1-4    |

|   | Art. | Pars.  |
|---|------|--------|
| Failing to collect assessment under Article 105 .....   | 105  | 20     |
| Making unlawful enlistment .....  | 55   | 1-2    |
| <b>OFFICERS:</b>  |      |        |
| Arrest or confinement of, except under Article 68 (quarrels, frays, etc.) must be by order of commanding officer .....  | 69   | 12     |
| Cannot be reduced in grade by court-martial sentence .....  | 45   | 3      |
| How triable .....   | 16   |        |
| Reduction to ranks .....  | 44   |        |
| Separation from the service .....   | 118  | 1-53   |
| Acceptance of civil or incompatible military office ..  | 118  | 37-38a |
| Discharge by order .....  | 118  | 1-6    |
| Discharge under sec. 24b, N.D. Act .....  | 118  | 17     |
| Discharge or dismissal cannot be revoked .....  | 118  | 39-44  |
| Dismissal by the President .....  | 118  | 7-10   |
| Dismissal by sentence of court-martial .....  | 118  | 11-12b |
| Dropped from the rolls .....  | 118  | 13-15  |
| National Guard and reserve officers .....   | 118  | 45-52a |
| Resignation .....   | 118  | 18-36  |
| Warrant officers .....  | 118  | 53-54  |
| Wholly retired .....  | 118  | 16     |
| Suspension from rank and command .....  | 45   | 3      |
|   | 47   | 14a    |
| <p style="text-align: center;">P</p>  |      |        |
| <b>PAY; STOPPAGE OF, FOR LOSS, DAMAGE OF MILITARY PROPERTY .....</b>  | 83   | 2-3    |
| Forfeiture during absence without leave .....   | 61   | 11-12  |
| <b>PENITENTIARY, CONFINEMENT IN:</b>  |      |        |
| Authorized for the military offenses named in Article 42 and for offenses of a civil nature (although charged as violations of the Articles of War) punishable by civil law by confinement for more than one year ..... | 42   | 2      |
| Discharged soldier serving sentence of court-martial in, still subject to military control .....  | 2    | 33     |
| Escape of military prisoner from, is military offense and not punishable by penitentiary confinement .....  | 69   | 31a    |
| Not authorized for military offenses except those named in Article 42 .....   | 42   | 2      |
| Sentences to, restrictions .....  | 45   | 20     |
| When lawful .....   | 42   | 1-16   |
| <b>PERJURY .....</b>  | 93   | 75-83  |
| Acquittal in case in which alleged to have been committed is good defense, in absence of new evidence .....   | 40   | 13     |
| <b>PERSONAL INTEREST IN SALE OF PROVISIONS .....</b>  | 87   |        |
| <b>PERSONS SUBJECT TO MILITARY LAW (See Military Law, Persons subject to)</b>   |      |        |
| <b>PETITION FOR NEW TRIAL .....</b>   | 53   |        |
| <b>PLEAS BEFORE COURTS-MARTIAL:</b>   |      |        |
| Accused must be arraigned .....   | 21   | 1-4    |
| Change of plea .....  | 21   | 11-15  |

|   | <i>Art.</i> | <i>Pars.</i> |
|---|-------------|--------------|
| Effect of plea of guilty, explanation to accused .....  | 21          | 3, 4, 8      |
|   | 37          | 71, 76       |
|   | 45          | 17           |
| General issue .....   | 21          | 7-9          |
| Kinds of .....  | 21          | 5-9          |
| Motions .....   | 21          | 10-17        |
| Plea of guilty to specification which does not allege all<br>material elements of offense is void ..... | 37          | 33           |
| Plea of guilty with exceptions .....  | 21          | 5            |
| Refusal or failure to plead, effect .....   | 21          | 2, 23        |
|   | 37          | 18           |
| PRECEDENCE AMONG OFFICERS OF VARIOUS COM-<br>PONENTS OF THE ARMY .....                                  | 119         | 1-2          |
|   | 120         | 1-7          |
| PRESIDENT OF COURT-MARTIAL, AUTHORITY OF ..   | 4           | 2            |
| PREVIOUS CONVICTIONS .....  | 37          | 44           |
|   | 45          | 6-9          |
| Consideration of, by court in fixing penalty, not double<br>jeopardy .....                              | 40          | 3            |
| PRISONER, RELEASE OF, WITHOUT AUTHORITY ....  | 73          | 1-2          |
| PRISONERS OF WAR AND INTERNEES:   |             |              |
| Cannot be tried for escape .....  | 69          | 31a          |
| Prescribed limitations on punishments of soldiers, ap-<br>plicable to .....                             | 45          | 1            |
| Subject to trial by court-martial, when .....   | 2           | 28-29        |
| PRISONERS RECEIVED, REPORT OF .....   | 72          |              |
| PROCEEDINGS, COURTS-MARTIAL, ACTION ON .....  | 47          |              |
|   | 48          |              |
|   | 49          |              |
|   | 50          |              |
| PROMOTION DOES NOT TERMINATE MILITARY JUR-<br>ISDICTION WHEN SERVICE IS CONTINUOUS ....                 | 2           | 4            |
| PROVOKING SPEECHES AND GESTURES .....   | 90          |              |
| PROVOST COURTS .....  | 15          | 10           |
| PUNISHMENTS:  |             |              |
| Additional, pending trial or result of trial, prohibited ....   | 16          |              |
| Cumulative .....  | 41          | 10           |
| Limitations on .....  | 45          | 1-20         |
| Multiple, not to be imposed .....   | 45          | 18           |
| Restrictions as to kinds of .....   | 41          | 1-10         |
| (See Disciplinary Powers of Commanding Officers)  |             |              |

## Q

|                                  |    |     |
|----------------------------------|----|-----|
| QUARRELS, FRAYS, DISORDERS ..... | 68 | 1-6 |
|----------------------------------|----|-----|

## R

|  |     |      |
|--|-----|------|
| RANK, PRECEDENCE, AND COMMAND, AMONG OFFI-<br>CERS OF VARIOUS COMPONENTS OF THE ARMY | 119 | 1-2  |
|  | 120 | 1-7  |
| RAPE .....   | 92  | 1-3  |
|  |     | 7-7h |

|   | <i>Art.</i> | <i>Pars.</i> |
|---|-------------|--------------|
| RECORDS OF COURTS-MARTIAL (See various kinds of courts)                   |             |              |
| REDRESS OF WRONGS OR INJURIES (See Injuries to Property)                  |             |              |
| REDUCTION OF OFFICER TO RANKS .....                                       | 44          |              |
| REENLISTMENT OF SOLDIER ALREADY IN SERVICE IS EVIDENCE OF DESERTION ..... | 28          | 1-4          |
| REFUSAL TO RECEIVE AND KEEP PRISONERS .....                               | 71          | 1-2          |
| REHEARING, WHEN AUTHORIZED, PROCEDURE ....                                | 52          |              |
| RELEASE OF PRISONER WITHOUT AUTHORITY .....                               | 73          | 1-2          |
| RELIEVING, CORRESPONDING WITH, OR AIDING THE ENEMY .....                  | 81          | 1-9          |
| REPORTER FOR COURT-MARTIAL:   |             |              |
| Appointment, duties, etc. ....  | 115         | 1-6          |
| Oath of .....   | 19          | 9            |
| REPORT OF PRISONERS RECEIVED .....  | 72          |              |
| RESERVE OFFICERS, ELIGIBILITY FOR SERVICE ON COURTS-MARTIAL .....         | 4           | 8            |
| RESERVES, WHEN SUBJECT TO TRIAL BY COURT-MARTIAL .....                    | 2           | 6-8          |
| RESIGNATION OF OFFICER (See Officers, Separation from Service) .....      | 118         | 18-36        |
| RESTRICTION TO LIMITS, CANNOT EXCEED THREE MONTHS .....                   | 45          | 16           |
| RETIRED OFFICERS, ELIGIBILITY FOR SERVICE ON COURTS-MARTIAL .....         | 4           | 7            |
| RETIRED PERSONNEL, SUBJECT TO TRIAL BY COURT-MARTIAL .....                | 2           | 11           |
| RETURNS, FAILURE TO MAKE .....  | 57          |              |
| REVIEWING AUTHORITY FOR COURTS-MARTIAL PROCEEDINGS .....                  | 46, 47      |              |
| REVIEW OF GENERAL COURT-MARTIAL PROCEEDINGS IN THE J. A. G. O. ....       | 50          |              |
| RIOTING, PENITENTIARY CONFINEMENT NOT AUTHORIZED FOR, DEFINITION .....    | 89          | 3-4          |
| ROBBERY .....   | 93          | 84-89a       |
| RULES OF PROCEDURE FOR COURTS-MARTIAL .....                               | 38          |              |

S

|   |     |      |
|---|-----|------|
| SELF-INCRIMINATION, NOT TO BE COMPELLED (See Confessions) ..... | 24  | 1-20 |
| SENTENCES OF COURTS-MARTIAL:                                    |     |      |
| Cumulative .....  | 41  | 10   |
| Mitigation, remission, suspension .....                         | 51  |      |
| Vote on .....   | 43  |      |
| SENTINEL, MISBEHAVIOR OF .....                                  | 86  | 1-8  |
| SEPARATION FROM THE SERVICE:                                    |     |      |
| Officers (See Officers etc.) ....                               | 118 | 1-54 |
| Soldiers (See Soldiers etc.) .....                              | 108 | 1-64 |

|  | <i>Art.</i> | <i>Pars.</i> |
|--|-------------|--------------|
| <b>SERVICEMEN'S READJUSTMENT ACT:</b>  |             |              |
| Provisions for review and modification of discharge or dismissal in certain cases .....                | 108         |              |
| <b>SLEEPING ON POST (See Sentinel etc.) .....</b>  | <b>86</b>   | <b>1-8</b>   |
| <b>SODOMY .....</b>  | <b>93</b>   | <b>90-94</b> |
| Refusal of participant to testify on ground of self-incrimination cannot be used against accused ..... | 37          | 48a          |
| <b>SOLDIERS' HOME, MEMBERS NOT SUBJECT TO MILITARY LAW .....</b>                                       | <b>2</b>    | <b>34</b>    |
| <b>SOLDIERS, SEPARATION FROM THE SERVICE .....</b>   | <b>108</b>  | <b>1-64</b>  |
| Bad Conduct discharge .....  | 108         | 12           |
|  | 12          |              |
|  | 13          |              |
| Cannot be revoked except for fraud .....   | 108         | 48-56        |
| Discharge by purchase .....  | 108         | 27           |
| Discharge for disability .....   | 108         | 28-29        |
| Discharge for fraudulent enlistment .....  | 108         | 30           |
| Dishonorable discharge .....   | 108         | 13-19        |
| Execution of discharge .....   | 108         | 35-47        |
| Honorable discharge .....  | 108         | 5-11         |
| In general .....   | 108         | 1-4          |
| Lost certificate .....   | 108         | 57-57a       |
| National Guard in Federal service .....  | 108         | 58-60        |
| Reasons for discharge .....  | 108         | 20-26        |
| Remarks upon discharge certificate .....   | 108         | 31           |
| Retired enlisted men .....   | 108         | 61-62        |
| Who may order or sign .....  | 108         | 32-34        |
| (See also Discharge of Soldier)  |             |              |
| <b>SOLDIERS TO MAKE GOOD TIME LOST .....</b>   | <b>107</b>  | <b>1-41</b>  |
| Due to misconduct—"Line-of-duty" cases .....   | 107         | 14-41        |
| In civil confinement .....   | 107         | 12-13        |
| In desertion .....   | 107         | 6-7          |
| In general .....   | 107         | 1-5          |
| In military confinement .....  | 107         | 9-11         |
| While absent without leave .....   | 107         | 8            |
| <b>SPECIAL COURTS-MARTIAL:</b>   |             |              |
| Announcement of action .....   | 29          | 1-2          |
| Appointed by whom (See Annotation following Article 10) .....  | 9           |              |
| Challenge of members .....   | 18          |              |
| Closed sessions .....  | 30          | 1-2          |
| Jurisdiction (See Annotation following Article 14) .....   | 13          |              |
| Members must be sworn .....  | 19          | 2            |
| Oaths of personnel and witnesses .....   | 19          | 1-10         |
| Persons disqualified as members (See Annotation following Article 10, par. 4) .....                    | 9           |              |
| Records .....  | 34          | 1-2          |
| Disposition of .....   | 36          |              |
| Trial judge advocates and counsel for defense .....  | 11          |              |
| <b>SPECIFICATIONS (See Charges)</b>  |             |              |
| <b>SPIES .....</b>   | <b>82</b>   |              |
| <b>STAFF JUDGE ADVOCATES TO BE ASSIGNED BY THE JUDGE ADVOCATE GENERAL .....</b>                        | <b>47</b>   | <b>1</b>     |

|  | <i>Art.</i> | <i>Pars.</i> |
|--|-------------|--------------|
| STATUTES OF LIMITATIONS (Articles 39 and 40):<br>(See Limitations upon Prosecutions) |             |              |
| STATUTORY RAPE .....   | 92          | 7            |
|  | 96          | 17           |
| SUMMARY COURTS-MARTIAL:  |             |              |
| By whom appointed .....  | 10          | 1-7          |
| Jurisdiction .....   | 14          |              |
| As to persons .....  | 14          | 1-2b         |
| As to offenses .....   | 14          | 3-5          |
| As to sentences .....  | 14          | 6-13         |
| Oath of witnesses .....  | 19          |              |
| Records .....  | 34          | 1-2          |
| Disposition of .....   | 36          |              |
| Retired officer as .....   | 10          | 8            |
| SUPERIOR OFFICER, DISRESPECT TOWARD .....  | 63          | 1-5          |
| Assaulting or wilfully disobeying .....  | 64          | 1-24         |
| SURRENDER OF DESERTER TO ALLIED FORCES ....  | 74          | 13           |
| SURRENDER OF OFFENDERS TO CIVIL AUTHORITIES<br>(See Civil Authorities)               |             |              |
| SUSPENSION FROM DUTY AND PAY DOES NOT NECES-<br>SARILY INVOLVE ARREST .....          | 69          | 7            |
| SUSPENSION FROM RANK AND COMMAND DOES NOT<br>AFFECT MILITARY JURISDICTION .....      | 2           | 2            |

T

|  |     |        |
|--|-----|--------|
| TIME LOST, SOLDIERS TO MAKE GOOD (See Soldiers<br>to make good etc.) .....           | 107 | 1-41   |
| TRIAL JUDGE ADVOCATE:  |     |        |
| Appointment .....  | 11  | 1-2    |
| Assistant, powers of .....   | 116 |        |
| Cannot make substantial amendments to charges .....                                  | 46  | 18     |
| Comment upon failure of accused to testify, improper ..                              | 37  | 69     |
| Duties and privileges .....  | 17  | 1-8    |
| Improper statement or argument by .....  | 37  | 15-15a |
| Not authorized to place accused in arrest or compel his<br>attendance in court ..... | 69  | 11     |
| Not subject to challenge .....   | 18  | 5      |
| Oath .....   | 19  |        |
| Presence during closed session .....   | 37  | 16, 66 |
| Punishable by court for contempt .....   | 32  | 5      |
| Relief of .....  | 11  | 4-7    |
| Responsible for proper preparation etc. of record .....                              | 33  | 1-13   |
| Who may be appointed, qualifications .....   | 11  |        |
| Accuser not necessarily disqualified .....   | 37  | 15     |

U

|   |    |     |
|---|----|-----|
| UNLAWFUL ENLISTMENT, OFFICER MAKING ..... | 55 | 1-2 |
|---|----|-----|

V

|  |    |      |
|--|----|------|
| VARIOUS CRIMES (See specific crimes named) ..... | 93 | 1-94 |
|--|----|------|

|   | <i>Art.</i> | <i>Pars.</i> |
|---|-------------|--------------|
| <b>W</b>  |             |              |
| <b>WARRANT OFFICER:</b>   |             |              |
| Authorized to quell frays or disorders .....  | 68          | 5            |
| Discharge of .....  | 118         | 53           |
| Not authorized to order soldiers into arrest except under<br>Article 68 (Quelling of Frays or Disorders) .....    | 69          | 12a          |
| Not an "officer" as term is used in Articles of War .....   | 1           | 1            |
| <b>WASTE OR UNLAWFUL DISPOSITION OF MILITARY<br/>PROPERTY .....</b>   | <b>84</b>   | <b>1-8</b>   |
| <b>WITNESSES BEFORE COURTS-MARTIAL:</b>   |             |              |
| Competency, question for the court .....  | 23          | 5-6          |
| Cross examination .....   | 37          | 21           |
| Evidence as to character of, when admissible .....  | 37          | 56           |
| Expert .....  | 22          | 13-14        |
|   | 37          | 63, 63a      |
| Failure to be sworn .....   | 37          | 20-20a       |
| Fees of .....   | 22          | 7-12         |
| For defense .....   | 22          | 15-16        |
| May modify testimony .....  | 37          | 42           |
| Mental capacity .....   | 37          | 22-23        |
| Not disqualified because names not appended to charges,<br>or because they did not testify at investigation ..... | 46          | 12, 20       |
| Oath of .....   | 19          |              |
| Process to obtain .....   | 22          | 1-6          |
| Refusal to appear or testify .....  | 23          | 1-3          |
| Wife, not compelled to testify against husband .....  | 25          | 2a           |
| <b>WITNESS FOR PROSECUTION DISQUALIFIED AS MEM-<br/>BER OF COURT .....</b>  | <b>4</b>    |              |
| <b>WOMEN'S ARMY CORPS .....</b>   | <b>2</b>    | <b>5c</b>    |
| As reporters for courts-martial .....   | 115         | 2a           |





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